(1)

Supreme Court, U.S.

No. 981248 FEB 3 1999

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

EUGENE E. KLECAN and DONALD SCHAUERTE,

Petitioners,

vs.

NEW MEXICO RIGHTS TO CHOOSE/NARAL; ABORTION AND REPRODUCTIVE HEALTH SERVICES; PLANNED PARENTHOOD OF THE RIO GRANDE; CURTIS BOYD, M.D.; LUCIA CIES, M.D.; BRUCE FERGUSON, M.D.; and LEWIS H. KOPLIK, M.D.,

Respondents.

On Petition For Writ Of Certiorari To The New Mexico Supreme Court

PETITION FOR WRIT OF CERTIORARI

EUGENE E. KLECAN
Attorney at Law
5613 Fair Oak Trail, N.E.
Albuquerque, NM 87109
(505) 821-6970
Attorney for Petitioners

10 pp

QUESTION PRESENTED FOR REVIEW

That question is: DOES THE COMPLAINT ITSELF REQUIRE THE DISMISSAL OF THE COMPLAINT BECAUSE OF THE DOCTRINE OF SOVEREIGNTY?

TABLE OF CONTENTS

Page

Question Presented For Review i

Direct Application of Sovereignty in the Santa Fe District Court 5

Jurisdiction 9

Statement of the Case 9

Reasons Why Our Petition Should Be Granted 12

Remedy 13

Conclusion 14

TABLE OF AUTHORITIES

Page

CASES

Arnold v. State, 48 N.M. 595, 154 P.2d 257 (1994) 3, 4, 8, 9, 12

Harris v. McRae, 448 U.S. 297, 65 L.Ed.2d 784, 100 S.Ct. 2671 (1980) 14

Roe v. Wade, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 739 (1973) 14

STATUTES

28 U.S.C. § 1257[123] 9

Enabling Act, 36 Statutes at Large, ch. 310, page 557 13

PETITION FOR WRIT OF CERTIORARI

As stated in the Rules for Certiorari by the U.S. Supreme Court, a Petition should be direct, succinct, including only what is necessary for review.

Petitioners adhere to that requisite by stating:

The Opinion of the New Mexico Supreme Court, App. 1-43.

Question Presented For Review

That question is: DOES THE COMPLAINT ITSELF REQUIRE THE DISMISSAL OF THE COMPLAINT BECAUSE OF THE DOCTRINE OF SOVEREIGNTY? In the order of presentation dictated by the Rules of the U.S. Supreme Court, the above question is the first category and we will treat it as such. One of the later requisites as to form of presentation required by the Supreme Court Rules is JURISDICTION. As to that term jurisdiction, when used to mean the jurisdiction of this court to hear our Petition for Certiorari, the same will be noted and answered hereinafter. As to the use of the term jurisdiction as applied to the Complaint filed by the Plaintiffs in the State District Court of Santa Fe County, New Mexico, that term jurisdiction is used herein to show a complete lack of jurisdiction in the New Mexico District Court for the County of Santa Fe to hear and entertain the cause of action alleged in the Complaint by the Plaintiffs below, who are the Respondents here. The Petitioners therefore assert as the reason for this Petition that there never was, never has been and is now no jurisdiction in the New Mexico District Court to hear the Complaint filed by the

Plaintiffs against Defendant which was the State of New Mexico, acting through its Human Services Department, a branch of the Executive Department of the State of New Mexico government. That lack of jurisdiction existed from the very beginning because of the aforementioned doctrine of sovereignty of the State of New Mexico government. This necessarily zeros in on the Complaint in the District Court of Santa Fe County, which has never been altered from the date it was filed. That Complaint by the Plaintiffs below is set out in the appendix, page one, and will be referred to hereinafter in this Petition as Exhibit 2. In a true sense, that Complaint is all determinative.

That Complaint is by a non-governmental person and the State of New Mexico through its Human Services Department, which is a part of the executive department, is the Defendant. That Complaint asks for declaratory relief in accordance with a statute of the State of New Mexico. The Complaint attacks a proposed HSD Resolution alleging the Resolution is unconstitutional, according to the State of New Mexico's Constitution. That Resolution itself says that abortions for medically necessary reasons cannot be funded with New Mexico taxpayers' funds. The above Complaint by abortion organizations, abortion providers, abortionist doctors, was filed to prevent the taking effect of that HSD Resolution, which Resolution said that the State of New Mexico would not fund abortions for medically necessary reasons (Exhibit 3, App. 60), and so, the Complaint seeks to prevent any interference with the ongoing policy of abortions at New Mexico taxpayers' expense. The attack therefore is by private individuals seeking to prevent the taking effect of a Resolution which would alter and amend the prior

Resolution. Petitioners submit that the doctrine of sovereignty demands the dismissal of the Complaint since it was void at the time it was filed on April 21, 1995.

Petitioners will now be brief and succinct and direct in following the rules of the United States Supreme Court for certiorari. First point, sovereignty of the State of New Mexico, is attacked by the Complainant because *the State is being sued by its own citizens without its consent.* The above statement about sovereignty cannot be attacked, minimized or qualified according to the laws of the State of New Mexico. Sovereignty is an attribute attached to the nature of a government, in this case, the State of New Mexico.

In keeping with our policy of briefness and directness, we assert that there is one case from New Mexico which is a case on sovereignty and we directly assert that it controls.

The rules of Sovereignty are superior to any Constitutional rights. In this case, the Plaintiffs in their Complaint allege unconstitutionality as the basis for their declaratory judgment. Sovereignty is *superior* as a right of the government to constitutional rules, at least insofar as constitutional principles of the New Mexico Constitution are the basis of the Plaintiffs' Complaint against the State of New Mexico.

We cite one case which controls. It is a sovereignty case. It is *Arnold v. State,* 48 N.M. 596, 154 P.2d 257, a Supreme Court of New Mexico case decided December 16, 1944. We assert that the principles stated in that case about sovereignty completely control the instant case. We attach that case as Exhibit 4. In direct terms, as required

by the Rules, we submit that the unconstitutional provisions found by the lower court, such as the Equal Rights Amendment, have no bearing because these particular Plaintiffs with their particular Complaint run directly into the sovereignty of the State of New Mexico. To quote from a headnote on the *Arnold v. State,* supra, case, "A sovereign state cannot be sued in its own courts without its consent." The opinion itself at page 598 of *Arnold,* supra, says the same as follows: "In *State ex rel. Evans v. Field,* 27 N.M. 384, 201 P. 1059, 1060, we said 'It is a fundamental doctrine at common law and everywhere in New Mexico that no sovereign state can be sued in its own courts or in any other without its consent and permission.' " *Arnold v. State,* supra, continues saying, "Indeed so fundamental is the lack of consent that it was treated as jurisdictional in the foregoing case and permitted to be raised for the first time in this court." In our case, this Petition is not the first time that your Petitioners have raised the issue of sovereignty. *Arnold v. State,* supra, continues by showing that the declaratory judgment statute did not remove the sovereign protection of the State of New Mexico. This is precisely the same situation as in our case. Our Supreme Court way back in 1944 treated the matter because the Declaratory Judgment Act involved in the *Arnold* case, supra, seemed to allow possibly a suit against the State under that Declaratory Act. The *Arnold* case directly denied the right of a person to sue the State of New Mexico and the reason was the application of the doctrine of sovereignty. So important as decisive of our case was the ruling of the Supreme Court of New Mexico in *Arnold,* supra, that we quote the exact language of that opinion.

> In Taos County Board of Education v. Sedillo, 44 N.M. 300, 101 P.2d 1027, 1032, in a case decided only a few years following enactment of this legislation, the likelihood that this language would soon be relied upon as constituting a general immunity on the part of the state to be sued under the provisions of the act was sensed. The matter was considered and we said: '. . . We take this first opportunity to correct any impression that section 3 of the act is a general consent on the part of the state to be sued under its provisions. We are agreed that it has no such meaning and has no greater effect, insofar as this consideration is concerned, than merely to permit parties to sue the state under the act where the state's consent to be sued otherwise exists and the facts warrant suit."

We attach as Exhibit 6 the decree of the lower court of Santa Fe County and as Exhibit 5, a finding of fact and conclusion. Obviously, he is interpreting the Complaint as a declaratory judgment and proceeds to put that declaration into his final decree. The Opinion of the New Mexico Supreme Court is reproduced as Exhibit 1 at App. 1.

DIRECT APPLICATION OF SOVEREIGNTY IN THE SANTA FE DISTRICT COURT

As stated above, there are no changes in the Complaint since the filing date of April 21, 1995. The Petitioners herein also raise the defense of "no right to sue a sovereign" from the very beginning and the District Court Judge Steve Herrera disputed that point from the very outset. This direct dispute between Petitioners

herein, Defendant Intervenors below, and the District Judge, appears in detail form in the transcript of the argument on summary judgment which preceded the State District Judge's ruling. At page 57 of the transcript of the proceeding described above on June 5, 1995, we have the direct conflict described above on the question of sovereignty. It was raised by attorney Klecan for the Intervenors in these words on page 57, transcript June 5, 1995.

> Mr. Klecan: If as a matter of fact it dawns upon me, and I have researched the law extensively, that sovereign immunity is involved in this case and I read all the cases at the University library on that point, and I'm convinced that the plaintiffs have no right to sue the State of New Mexico because of the sovereign immunity doctrine. The cases all hold in this case of a case in my opinion that you can't sue the state.
>
> Court: So the state can act unconstitutionally and no one can ever sue to prevent it?
>
> * * *
>
> Court: So again my question is still the same, which you haven't answered. Does that mean that the state can act unconstitutionally and no one can ever challenge it because they have sovereign immunity?

Mr. Klecan: Well, I addressed that problem and directly in my own thinking and I'm saying that the first premise of the whole thing is the right to sue.

Court: Right.

Mr. Klecan: So, you know, if your contention is correct or not your contention, the other side of it is that anybody that claims I've got a constitutional issue he can go ahead and sue the state and we have it's very safe and that it's been tried but every time except on tort claims has decided since that time and that's an exhaustive opinion that goes into the history since we've had it ever since this was a state, this sovereign immunity.

Court: So your position is that they can or they cannot sue if they think the state is doing something unconstitutionally?

Mr. Klecan: That these particular plaintiffs, that is the four individual doctors, have their own interests. There have been two or three attempts and organizations that say they are being deprived of their right to send people to the abortion doctors or perform them themselves like planned parenthood, *that they cannot sue the state under the sovereign immunity doctrine, and your question goes right to the point.* (Italics supplied).

> If it's the other side of the coin then all they have to do is say the state is acting unconstitutionally so that does away with the sovereign immunity doctrine.

Obviously, Judge Herrera of the Santa Fe District Court rejected the sovereign immunity doctrine as applied to the case and stated the superiority of the Constitution of the State of New Mexico over the doctrine of sovereign immunity. Therein in brief and completely accurate terms is the issue in this case. Judge Steve Herrera, as quoted above, held to the contrary. There can be no doubt as to the correctness of sovereign immunity being superior to Constitutional provisions. As viewed in the Complaint, Exhibit 2, it states only Constitutional reasons based on the New Mexico Constitution as a basis for its claim for temporary injunction and permanent injunction, both of which were granted. There were other reasons for the opposition to the Complaint, but our position is that the Complaint was void at its filing by virtue of the doctrine of sovereign immunity which New Mexico clearly follows. It is highly significant that the case filed by the Plaintiffs in the District Court of Santa Fe County asked for a declaratory judgment. In the New Mexico case above cited, *Arnold v. State*, supra, also involved a declaratory judgment act for New Mexico, which act seemed to allow a declaratory action against the State of New Mexico: however, the opinion itself deals directly with that situation and declares that anything in the declaratory judgment act contrary to the sovereign immunity of the State of New Mexico to be sued was inferior to the protection afforded the state under the doctrine of sovereign immunity. Nothing could

be clearer than that conclusion and decision in *Arnold v. State*, supra.

We decline to belabor the point any further. Justice Herrera decided the case against the sovereign who cannot be sued. *Arnold v. State*, supra.

JURISDICTION

The jurisdiction of the United States Supreme Court to hear Petitions like the instant one, on certiorari from a state court and involving the federal issue is pursuant to 28 U.S.C. §1257[123], as part of the appellate jurisdiction of the U.S. Supreme Court.

STATEMENT OF THE CASE

This case had its origin in the State Court of New Mexico for Santa Fe County on April 21, 1995. It was a Complaint by the Respondents against Dorothy Dansfelser, Secretary of the New Mexico Human Services Department as defendant. Within four working days, the Petitioners, Eugene E. Klecan and Donald Schaurete, who replaced John R. Linton, were granted the right of intervention by Judge Herrera, District Judge for Santa Fe County, and they participated in every proceeding in Santa Fe County District Court, New Mexico Supreme Court and in other proceedings in this United States Supreme Court. As the caption indicates, they were and are opposed to the Respondents on all the issues in all courts. The Human Services Department, a branch of the

executive department, was the original defendant and became an appellant in the New Mexico Supreme Court in August 3, 1995. Shortly thereafter, August 14, 1995, the petitioners herein also became appellants and by virtue of a pleading in the New Mexico Supreme Court by the appellees, the defendants in intervention below, appellants in the Supreme Court, also became appellees on the cross appeal. On July 26, 1994, the District Court of Santa Fe County filed its judgment, a copy of which is attached as Exhibit 6. It was a Judgment that was appealed in August of 1995. The facts and pleadings of the case actually began on December 1, 1994 at which time the then executive department under Governor Bruce King issued an executive resolution which drastically changed the abortion program in New Mexico. Prior to December 1, 1994, medically necessary abortions were not allowed in New Mexico and had never been allowed. The executive resolution attached as Exhibit 7 allowed medically necessary abortions. As of January 1, 1995, a new Governor came into office and shortly thereafter, issued an HSD Resolution which restored abortions to the same situation as had prevailed prior to December 1, 1994, which meant that medically necessary abortions were not allowed. The original abortion situation was part of the Medicaid Act whereby the State of New Mexico, like practically all other states, together with the federal government, adopted a Medicaid plan with reimbursement for the combined Medicaid services, being apportioned between the federal government and the state government with the federal government bearing the major cost of the expenditures under the Medicaid Act. There is no legislative act of the Legislature of the State of New Mexico

which provided for abortions for medically necessary reasons. The instant Complaint was filed by the Respondents for the purpose of declaring the medically necessary abortions to be valid because as the Complaint alleges, the Respondents here and Plaintiffs below, the appellees in the New Mexico Supreme Court, claimed that the new Resolution replacing the December 1, 1994 Executive Resolution was unconstitutional. There have been no pleading changes from the April, 1995 filing date of the complaint.

Santa Fe District Judge Steve Herrera granted the first prayer for relief by the Plaintiffs below and enjoined the substitution of the HSD Resolution, which would have returned the abortion picture to the situation prevailing December 1, 1994 when medically necessary abortions were allowed.

The final decree by Judge Herrera authorized abortions at taxpayers' expense, which had been started on or about December 1, 1994, when the prior Governor, through his Secretary of the HSD, authorized abortions at the public expense through the HSD. The Resolution of the succeeding HSD did not take effect because of the order by Judge Herrera enjoining the same, which restored the ongoing program of abortions at public expense which began as a result of the HSD Resolution of December 1, 1994. We repeat, the State of New Mexico through the HSD in which the Secretary of the HSD was the named defendant became an appellant with the intervenors in the New Mexico Supreme Court. The pleadings have not been changed during the course of the proceedings in the appellate courts, both in the New Mexico Supreme Court and in the United States Supreme Court.

The Complaint originally filed in the District Court of Santa Fe County asks for a "temporary restraining order, preliminary injunction, permanent injunction, and declaratory judgment." The Plaintiffs below were successful in obtaining approval by the ruling of the Santa Fe District Court Judge, which was dated July 26, 1995 and which was the final judgment on which the appeals were based. Exhibit 6, supra.

REASONS WHY OUR PETITION SHOULD BE GRANTED

The reason is simple, direct and concise for granting this Petition for Certiorari because the Complaint is by private individuals against the State of New Mexico and the Complaint was a nullity at the time it was filed pursuant to the doctrine of sovereign immunity, which New Mexico had and has and which was laid down as applying to a declaratory judgment act in the case of *Arnold v. State,* supra. Further, the District Court Judge, Steve Herrera, directly addressed that doctrine, namely, sovereign immunity, and expressly found the Constitutional provisions were superior to the sovereign immunity doctrine. Nothing has changed since the date the case was filed on April 21, 1995. The arguments were set out above at the time of the closing arguments between Petitioners and Judge Herrera. New Mexico as a state has no sovereign status for the time honored attributes of a sovereign if the conclusion of Judge Herrera as stated above is correct. The doctrine of sovereignty cannot be waived; it can be found by the Court on its own motion and the Enabling Act whereby the State of New Mexico

came into the Union obligates the federal government to protect the sovereign status of the State of New Mexico against complaints similar to the Complaint that was filed by the Plaintiffs herein. If, as pointed out in the final arguments quoted between Petitioners' counsel and Judge Herrera, the State can be subjected to Complaints similar to the one filed in this case under the guise that it is unconstitutional, then anyone can attack the State and involve it in any number of actions claiming unconstitutionality about a proposed Resolution which the complainant claims is unconstitutional. Only the doctrine of sovereign immunity can protect a sovereign like the State of New Mexico from being destroyed at the instance of lawsuits claiming that a proposed Resolution by the Executive Department is unconstitutional.

We submit that under these circumstances, the denial of this writ would be a violation of the Enabling Act by which the State of New Mexico came into the Union of the United States of America in 1912.

REMEDY

No attempt is made to litigate for those of the unborn who have been eliminated by virtue of past abortions. We are aware and have so asserted in other of our pleadings in this court that one of the grounds for a stay while the case is pending is the belief as to the successful outcome in the future of the litigation in question. This does not apply to an abortion situation. For the reason that we have already stated, namely, that this lawsuit is an attack upon the sovereignty of the State of New Mexico and

therefore has no adversary status by which they can litigate. Therefore, we are requesting this court and it certainly has the authority and jurisdiction, to order a dismissal of the lawsuit. The numbers of abortions performed and the thousands of dollars expended need not be argued. As is certainly true, sovereignty of the State of New Mexico as applied to this case is not debatable or issuable. Anything to the contrary exposes all government acts to attack by non-injured persons and would be based only on the fact that the nongovernmental plaintiffs and non-injured plaintiffs want the governmental act eliminated.

CONCLUSION

Viewed from this viewpoint, which we submit is the only possible viewpoint for this particular Complaint, the issues of abortion *vel non,* pro choice versus pro life, etc., are all irrelevant leading to the conclusion *that this is not an abortion case.* It is strictly a question of the sovereign immunity of the State of New Mexico to be sued. What practical conclusions can be drawn insofar as abortion issues, etc., is completely irrelevant, including what has happened in the State of New Mexico as a result of various resolutions by the Executive Department. A decision enforcing sovereign immunity cannot look forward to what might be the practical consequences of dismissing the Complaint. To try to forecast the course of the abortion issues, the progress or application of *Roe v. Wade,* 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 739 (1973), or *Harris v. McRae,* 448 U.S. 297, 65 L.Ed.2d 784, 100 S.Ct. 2671 (1980), are all beside the point. Petitioners herein

raised sovereign immunity in the trial court. We stand in that position and ask this Court to declare the Complaint void from the time it was filed.

Respectfully submitted,

EUGENE E. KLECAN
5613 Fair Oak Trail, N.E.
Albuquerque, NM 87109
(505) 821-6970
Attorney for Petitioners
License #1418 admitted 1953

EXHIBIT LIST

Exhibit 1
Opinion of the New Mexico Supreme Court.... App. 1

Exhibit 2
Complaint ..... App. 44

Exhibit 3
HSD Resolution ..... App. 60

Exhibit 4
Arnold v. State ..... App. 63

Exhibit 5
Conclusion of Santa Fe County District Court ..... App. 70

Exhibit 6
Santa Fe County District Court Decree ..... App. 71

Exhibit 7
Executive Resolution ..... App. 73

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: _____

Docket No. 23, 239

NEW MEXICO RIGHT TO CHOOSE/NARAL, ABORTION AND REPRODUCTIVE HEALTH SERVICES, PLANNED PARENTHOOD OF THE RIO GRANDE, CURTIS BOYD, M.D., LUCIA CIES, M.D., BRUCE FERGUSON, M.D., and LEWIS KOPLIK M.D.,

Plaintiffs-Appellees
and Cross-Appellants,

vs.

WILLIAM JOHNSON, Secretary of New Mexico Human Services Department,

Defendant-Appellant
and Cross-Appellee,

and

EUGENE E. KLECAN and DONALD SCHAURETE,

Defendants-in-Intervention and
Appellants and Cross-Appellees.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS Steve Herrera, District Judge

Crider, Calvert & Bingham, P.C.
Stevan Douglas Looney, Special Assistant Attorney General
Albuquerque, NM

White, Koch, Kelly & McCarthy, P.A.
M. Karen Kilgore
Santa Fe, NM

Charles J. Milligan, General Counsel
New Mexico Human Services Department
Santa Fe, NM

for Appellant and Cross-Appellee, William Johnson, Secretary of Human Services Department

Eugene E. Klecan
Albuquerque, NM

for Appellants and Cross-Appellees Eugene E. Klecan and Donald Schaurete

Freedman, Boyd, Daniels, Peifer, Hollander, Guttman & Goldberg
J. Michele Guttmann
Albuquerque, NM

Louise Melling
Catherine Weiss
Reproductive Freedom Project
American Civil Liberties Union Foundation
New York, NY

Cynthia A. Fry
Albuquerque, NM

Priscilla Smith
Catherine Albisa
Center for Reproductive Law & Policy
New York, NY

Ann Scales
Albuquerque, NM

Maureen Sanders
Albuquerque, NM

Philip B. Davis
ACLU of New Mexico
Albuquerque, NM

Roger Evans
Legal Action for Reproductive Rights
Planned Parenthood Federation of America
New York, NY

Carpenter & Chavez, Ltd.
David J. Stout
Albuquerque, NM

for Appellees and Cross-Appellants

Paul Benjamin Linton, Acting General Counsel
Americans United for Life
Chicago, IL

for Amici Curiae
Senator Duncan Scott, Representative
Frank Bird, and
Other Members of the New Mexico
Legislature

Bopp, Coleson & Bostrom
James Bopp, Jr.
John K. Abegg
Terre Haute, IN

for Amicus Curiae
Right to Life Committee of New Mexico

Hon. Tom Udall, Attorney General
Martha A. Daly
Elizabeth A. Glenn, Assistant Attorneys General
Santa Fe, NM

for Amicus Curiae
New Mexico Attorney General

Michael B. Browde
Christian G. Fritz
Albuquerque, NM

for Amici Curiae
New Mexico Leagues of Women Voters
and New Mexico Legislators

Martha F. Davis
Deborah A. Ellis
NOW Legal Defense and Education Fund
New York, New York

Rondolyn R. O'Brien
Albuquerque, NM

for Amici Curiae
New Mexico Women's Bar Association
and New Mexico Public Health Association

OPINION

(Filed Nov. 25, 1998)

MINZNER, Justice.

(1) This case concerns the authority of the Secretary of the New Mexico Human Services Department to restrict funding for medically necessary abortions under the State's Medicaid program. The Secretary appeals the district court's order permanently enjoining the Department from enforcing a rule that prohibits the use of state funds to pay for abortions for Medicaid-eligible women except when necessary to save the life of the mother, to end an ectopic pregnancy, or when the pregnancy resulted from rape or incest. Under the district court's order, the Department must allow the use of state funds to pay for abortions for Medicaid-eligible women when they are medically necessary. Under the court's order, an abortion

is "medically necessary" when a pregnancy aggravates a pre-existing condition, makes treatment of a condition impossible, interferes with or hampers a diagnosis, or has a profound negative impact upon the physical or mental health of an individual.

(2) The Court of Appeals certified the appeal to this Court because it presented a significant question of law under the New Mexico Constitution. Based on the independent grounds provided by the Equal Rights Amendment to Article II, Section 18 of our state constitution, we affirm the district court's order. New Mexico's Equal Rights Amendment requires a searching judicial inquiry to determine whether the Department's rule prohibiting state funding for certain medically necessary abortions denies Medicaid-eligible women equality of rights under law. We conclude from this inquiry that the Department's rule violates New Mexico's Equal Rights Amendment because it results in a program that does not apply the same standard of medical necessity to both men and women, and there is no compelling justification for treating men and women differently with respect to their medical needs in this instance. The district court did not exceed its authority in providing a remedy for this constitutional violation by enjoining the Department from enforcing its rule and requiring the Department to apply the standard of medical necessity in a nondiscriminatory manner in this case.

(3) As an alternative basis for affirming the district court's order, Plaintiffs argue that a woman's right to reproductive choice is among the inherent rights guaranteed by Article II, Section 4 of the New Mexico Constitution, and that the Department's rule unlawfully infringes

upon this right because it favors childbirth over abortion. It is unnecessary for us to reach the broader questions raised by this argument, however, because we decide this appeal based upon the Department's violation of the Equal Rights Amendment to Article II, Section 18 of our state constitution. Thus, our discussion is limited to the protection afforded by New Mexico's Equal Rights Amendment in the situation where the Department has elected to provide medical assistance to needy persons in this state.

I.

(4) We begin with a review of the factual and legal developments that led to this appeal. For many years, both federal and state law have provided funding for persons to obtain medical assistance when they meet certain criteria based on financial and medical need. At the federal level, Title XIX of the Social Security Amendments of 1965, 42 U.S.C. §§ 1396 to 1396v (1994 & Supp. II 1996), establishes a program, commonly known as "Medicaid," for the purpose of providing federal financial assistance to states that choose to participate. Under the program, the federal government pays a percentage of the total cost that a participating state incurs in providing certain categories of medical care and services to needy persons. *See* 42 U.S.C. § 1396b(a), 1396d(b)(1). While a state's medical assistance plan must contain a number of required elements in order to qualify for federal funding, *see Hern v. Beye*, 57 F.3d 906, 910 (10th Cir. 1995), "Title XIX does not obligate a participating State to pay for those medical services for which federal reimbursement is unavailable," *Harris v. McRae*, 448 U.S. 297, 309 (1980).

(5) Except in cases of rape or incest, or when necessary to save the life of the mother, abortions are among the medical services for which federal funding is unavailable under a provision of federal law known as "the Hyde Amendment." *See* Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994).[1] However, "[a] participating State is free, if it so chooses, to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable." *Harris*, 448 U.S. at 311 n.16.

(6) Section 27-2-12 of New Mexico's public Assistance Act, NMSA 1978, § 27-2-12 (1993), authorizes the Medical Assistance Division of the Human Services Department to issue regulations regarding the provision of medical assistance to persons eligible for public assistance programs under the federal Social Security Act. Pursuant to Section 27-2-12, the Department issued a rule, known as

---

[1] We note that the Hyde Amendment is not "permanent legislation" but rather part of a statute appropriating funds for certain departments of the federal government for one fiscal year. *See Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 477 (1996) (per curiam). However, all versions of the Hyde Amendment subsequent to the district court's order have retained essentially the same restrictions. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 508, 110 Stat. 1321, 1321-243 (1996); Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 508, 110 Stat. 3009, 3009-269 (1996); Balanced Budget Act of 1997, Pub. L. No. 105-33, § 2105(c)(1), (7), 111 Stat. 251, 561, 562-63 (1997). The question of the temporal scope of the district court's order is not before us.

"Rule 766," that restricted the availability of abortions under the State's medical assistance plan. In response to concerns about its constitutionality, the Department revised Rule 766 in 1994 to expand the availability of abortions under the State's medical assistance plan. The revised rule allowed the use of state funds to provide abortions for Medicaid-eligible women when they are medically necessary. *See* Pregnancy Termination Procedures, N.M. Human Servs. Dep't, Med. Assistance Div. Reg. 766, 5 N.M. Reg. 1632 (Dec. 15, 1994, prior to 1995 amendment). The 1994 rule defined an abortion as "medically necessary" when a pregnancy "aggravates a preexisting condition, makes treatment of a condition impossible, interferes with or hampers a diagnosis, or has a profound negative impact upon the physical or mental health of an individual." *Id.* Under the 1994 rule, abortions for Medicaid recipients that met this definition of "medically necessary" but did not fit into the exceptions of the Hyde Amendment were paid for exclusively with state funds.

(7) After a new Secretary was appointed, the Department made another revision of Rule 766 that was scheduled to take effect in May 1995. The 1995 rule restricted state funding of abortions under the Department's medical assistance program to those certified by a physician as necessary to save the life of the mother or to end an ectopic pregnancy, or when the pregnancy resulted from rape or incest. *See* Pregnancy Termination Procedures, N.M. Human Serv. Dep't, Med. Assistance Div. Reg., 6 N.M. Reg. 684 (Apr. 29, 1995) (codified at 8 NMAC

4.MAD.766 (May 1, 1995)).[2] On April 21, 1995, however, Plaintiffs brought suit in the district court to prevent the 1995 revision of Rule 766 from taking effect.

(8) Plaintiffs' complaint alleged that Rule 766 violates the rights of Medicaid-eligible women under Article II, Sections 4 and 18 of the New Mexico Constitution. The Department denied these allegations. Eugene E. Klecan filed a motion, in which Donald Schaurete later joined, to intervene as of right as a taxpayer and representative of the potential life of the unborn. The district court granted the motion to intervene. The Attorney General declined to represent the Department and was later allowed to present arguments as an amicus curiae.

(9) On May 1, 1995, the district court granted a preliminary injunction to keep the 1995 revision of Rule 766 from taking effect. Both Plaintiffs and the Department subsequently filed motions for summary judgment and entered stipulations of fact. On July 3, 1995, the district court issued a memorandum opinion concluding that the 1995 revision of Rule 766 violates Article II, Section 18 of the New Mexico Constitution. On this basis, the district court granted Plaintiffs' motion for summary judgment and made the injunction permanent. The Department appealed this ruling. Klecan and Schaurete also appealed. Plaintiffs cross-appealed the orders allowing Klecan and

---

[2] For ease of reference, all subsequent citations to the New Mexico Human Services Department Rules are to the New Mexico Administrative Code as amended through May 1, 1995, unless otherwise noted.

Schaurete to intervene.[3] On October 13, 1995, the Court of Appeals certified the appeals to this Court.

II.

(10) The parties raise several threshold questions that we must answer before turning to the merits of the district court's ruling. First, the Department challenges Plaintiffs' standing to assert a claim on behalf of pregnant women who seek medically necessary abortions under the State's medical assistance program. Second, Plaintiffs challenge the district court rulings that allowed Klecan and Schaurete to intervene as of right in this case. Third, Klecan and Schaurete assert that Plaintiffs' claims must be dismissed because the doctrine of sovereign immunity bars them from bringing suit against the Department. Finally, the Department asserts that the district court's order granting Plaintiff's motion for summary judgment was improper because there are disputed issues of material fact.

A.

(11) Plaintiffs Curtis Boyd, M.D., Lucia Cies, M.D., Bruce Ferguson, M.D., and Lewis H. Koplik, M.D., are individual physicians who provide reproductive health care services, including abortions, to Medicaid-eligible

---

[3] Plaintiffs also cross-appealed the district court's refusal to award attorney fees. However, this Court granted a stay of the cross-appeal regarding Plaintiffs' attorney fees pending the disposition of the other issues. We do not address the issue of attorney fees in this opinion.

women. Plaintiff Abortion and Reproductive Health Services is a non-profit organization that also provides such services. Plaintiff Planned Parenthood of the Rio Grande is a non-profit organization that provides counseling and referral on pregnancy options, including abortion, and loans funds for abortions to Medicaid-eligible women. Plaintiff New Mexico Right to Choose/NARAL is a non-profit advocacy organization with members who are Medicaid-eligible women. The Department contends that Plaintiffs do not have standing to bring this lawsuit because none of them are Medicaid-eligible women who seek a medically necessary abortion and were denied it due to Rule 766.

(12) In order to obtain standing for judicial review in new Mexico, litigants generally must allege that they are directly injured as a result of the action they seek to challenge in court. *See De Vargas Sav. & Loan Ass'n v. Campbell*, 87 N.M. 469, 472, 535 P.2d 1320, 1323 (1975); *Ramirez v. City of Santa Fe*, 115 N.M. 417, 420, 852 P.2d 690, 693 (Ct. App. 1993); *cf. City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 16, 124 N.M. 640, 954 P.2d 72 (noting prerequisites of "actual controversy" in declaratory judgment actions). Following the trend in federal standing law articulated in *Sierra Club v. Morton*, 405 U.S. 727 (1972), and *United States v. SCRAP*, 412 U.S. 669 (1973), however, this requirement is met even when the extent of the alleged injury is slight, *See Ramirez*, 115 N.M. at 420, 852 P.2d at 693, or the allegation is made by an organization on behalf of its members, *See National Trust for Historic Preservation v. City of Albuquerque*, 117 N.M. 590, 594, 874 P.2d 798, 802 (Ct. App. 1994). Moreover,

New Mexico state courts are not subject to the jurisdictional limitations imposed on federal courts by Article III, Section 2 of the United States Constitution. *See John Does I Through III v. Roman Catholic Church of the Archdiocese of Santa Fe, Inc.*, 1996-NMCA-094, ¶¶ 25-26, 122 N.M. 307, 924 P.2d 273; *cf. State ex rel. Clark v. Johnson*, 120 N.M. 562, 569, 904 P.2d 11, 18 (1995) (concluding that it is within this Court's discretion to confer standing " 'on the basis of the importance of the public issues involved.' " (quoting *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974))).

(13) Nevertheless, the exercise of this Court's discretion to confer standing should be guided by prudential considerations, particularly when litigants seek to assert claims on behalf of third parties. *Cf. John Does I Through III*, 1996-NMCA-094, ¶ 25 ("The requirements for standing derive from constitutional provisions, enacted statutes and rules, and prudential considerations."). Under federal standing law, courts consider the following three criteria in determining the right of litigants to bring actions on behalf of third parties:

> The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Powers v. Ohio, 499 U.S. 400, 411 (1991) (citations omitted); *see also Singleton v. Wulff*, 428 U.S. 106, 112-16 (1976) (plurality opinion); *Craig v. Boren*, 429 U.S. 190, 192-97 (1976). These three criteria, as applied by the plurality in

Singleton, 428 U.S. at 112-18, warrant our consideration in this case.

(14) Insofar as they are providers of abortion services to Medicaid-eligible women, Plaintiffs have both a direct financial interest in obtaining state funding to reimburse them for the cost of these services, *see id.* at 112-13, and a close relation to the Medicaid-eligible women whose rights they seek to assert in court, *see id.* at 117. Insofar as Plaintiff New Mexico Right to Choose/NARAL seeks to assert the rights of its members who are Medicaid-eligible women, this organization also has a sufficiently direct interest and a sufficiently close relationship. *Cf. National Trust for Historic Preservation*, 117 N.M. at 594, 874 P.2d at 802 (organization may assert claim on behalf of its members). Further, we agree with the plurality in *Singleton*, 428 U.S. at 117-18, that privacy concerns and time constraints impose a significant hindrance on the ability of Medicaid-eligible women to protect their own interest in obtaining medically necessary abortions. For all of these reasons, we determine that Plaintiffs have standing to challenge the constitutionality of Rule 766 in this case.

B.

(15) In the district court, Klecan and Schaurete moved to intervene as of right under Rule 1-024(A) NMRA 1998. They did not assert a statutory right to intervene under Rule 1-024(A)(1), nor did they seek permissive intervention under Rule 1-024(B). Thus, we must determine whether the district court applied the correct legal standard in granting the motion to intervene under Rule 1-024(A)(2). *Cf. State v. Elinski*, 1997-NMCA-117, ¶ 8, 124

N.M. 261, 948 P.2d 1209 (providing for de novo review of a discretionary decision that is premised on misapprehension of the law).

(16) Under Rule 1-024(A)(2), anyone who makes a timely application shall be permitted to intervene

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Plaintiffs contend that Klecan and Schaurete's asserted interest as taxpayers and protectors of the potential life of the unborn is not sufficient to meet this standard. We agree with Plaintiffs that Klecan and Schaurete fail to meet the requirements of Rule 1-024(A)(2).

(17) Rule 1-024(A)(2) requires a person claiming a right of intervention to demonstrate an interest in the action "that is significant, direct rather than contingent, and based on a right belonging to the proposed intervenor rather than [to] an existing party to the suit." *Cordova v. State ex rel. Human Servs. Dep't (In re Marcia L.)*, 109 N.M. 420, 421, 785 P.2d 1039, 1040 (Ct. App. 1989). In this respect, the requirements for intervention as of right seem to accord with the general requirements for standing. *Cf.* Rule 1-082 NMRA 1998 (rules of civil procedure shall not be construed to extend court's jurisdiction); *In re Marcia L.*, 109 N.M. at 421, 785 P.2d at 1040 (noting that Rule 1-024(A) "is almost identical to [Fed. R. Civ. P.] 24(a)"); 6 James Wm. Moore et al., *Moore's Federal Practice*

§ 24.03[2][d], at 24-37 (3d ed. 1998) (advocating the view that a party who lacks standing cannot intervene under Fed. R. Civ. P. 24(a)). However, while we may confer standing to decide an issue of great public importance, *see State ex rel. Clark*, 120 N.M. at 569, 904 P.2d at 18, this power to confer standing " 'does not equate with rights of indiscriminate intervention.' The bounds of [Rule 1-024] are to be observed." *Dominguez v. Rogers*, 100 N.M. 605, 608, 673 P.2d 1338, 1341 (Ct. App. 1983) (quoting *Peterson v. United States*, 41 F.R.D. 131, 135 (D. Minn. 1966) (mem.)).

(18) In this case, Klecan and Schaurete assert that their interests as taxpayers will be harmed by the expenditure of state funds for medically necessary abortions. However, they have not alleged that such an expenditure will change their tax liability in any way, or that any of their tax payments are earmarked for the purpose of paying for abortions. Thus, we conclude that Klecan and Schaurete's interest as taxpayers is not sufficiently direct to meet the requirements of Rule 1-024(A)(2). *See In re Marcia L.*, 109 N.M. at 421, 785 P.2d at 1040; *cf. Eastham v. Public Employees' Retirement Ass'n Bd.*, 89 N.M. 399, 405, 553 P.2d 679, 685 (1976) (concluding that taxpayers lack standing when they fail to demonstrate that they " 'will be affected by the acts sought to be enjoined in any other manner than any other taxpayer of the state' " (quoting *Asplund v. Hannett*, 31 N.M. 641, 645, 249 P. 1074, 1075 (1926))). As such, Klecan and Schaurete's asserted interest as taxpayers does not entitle them to intervene as a matter of right in this case.

(19) With regard to Klecan and Schaurete's alleged interest as representatives of the potential life of the

unborn, we conclude that interest is adequately protected by the Department in this case. "Where the State . . . is named as a party to an action and the interest the applicant seeks to protect is represented by a governmental entity, a presumption of adequate representation exists." *Chino Mines Co. v. Del Curto*, 114 N.M. 521, 524, 842 P.2d 738, 741 (Ct. App. 1992); *see also Planned Parenthood League of Mass., Inc. v. Attorney General*, 677 N.E.2d 101, 109 (Mass. 1997); 6 Moore et al., *supra*, § 24.03[4][a][iv][A], at 24-46.1 to 24-46.2; *cf. In re Marcia L.*, 109 N.M. at 421, 785 P.2d at 1040 (intervention under rule 1-024(A) must be "based on a right belonging to the proposed intervenor rather than [to] an existing party to the suit"). Thus, to the extent that the interest in the potential life of the unborn requires legal representation in this case, the Department is presumed to represent that interest adequately.

(20) To overcome this presumption, the proposed intervenors must demonstrate that the representation is inadequate by showing, for example, an adversity of interest, collusion, or nonfeasance on the part of the Department. *See Chino Mines Co.*, 114 N.M. at 524, 842 P.2d at 741; 6 Moore et al., *supra*, § 24.03[4][a][ii], at 24-45. In this case, Klecan, Schaurete, and the Department share the same ultimate objective – upholding the constitutionality of Rule 766. While the record indicates that there may have been some difference of opinion about the tactics used to accomplish this objective, such differences are insufficient to establish an adversity of interest. *See Planned Parenthood League*, 677 N.E.2d at 109; 6 Moore et al., *supra*, § 24.03[4][a][iii], at 24-45. Further, the fact that the Attorney General chose to support the Plaintiffs' position as an

amicus curiae does not show collusion or nonfeasance on the part of the Department. The record shows that the Department was provided with independent and adequate representation notwithstanding the Attorney General's position in this case.

(21) For these reasons, the proposed intervenor's "assertion of an interest in the protection of 'unborn' children is also insufficient to justify intervention as of right." *Keith v. Daley*, 764 F.2d 1265, 1271 (7th Cir. 1985); *cf. Dominguez*, 100 N.M. at 608, 673 P.2d at 1341 (rejecting a father's application to intervene as of right in an action for wrongful death of his daughter where the father's interest was represented by a duly appointed personal representative and the father failed to show that representation was inadequate). We conclude that the district court's decision to grant the motion to intervene as of right requires reversal "because it was premised on a misapprehension of the law." *Elinski*, 1997-NMCA-117, ¶ 8.

(22) Because we reverse on this issue, we need not reach the question of whether Klecan and Schaurete were denied due process after the district court erroneously granted their motion to intervene. In light of the public importance of the other constitutional issues presented in this case, however, we consider Klecan and Schaurete's other arguments as if they were presented by an amicus curiae. *Cf.* 6 Moore et al., *supra*, § 24.03[2][b], at 24-29 ("[A]pplicants concerned only about the legal principles that apply to an action may appear as amici curiae, but they are not entitled to intervene as of right.").

C.

(23) Klecan and Schaurete assert that Plaintiffs' complaint must be dismissed because the Department is not subject to suit in this matter. Section 44-6-13 of the Declaratory Judgment Act, NMSA 1978, § 44-6-13 (1975), however, plainly states that "the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights . . . of the parties call for a construction of the constitution of the state of New Mexico." Further, we have heard other claims against the Department that challenge the constitutionality of its public assistance programs, *see, e.g., Howell v. Heim*, 118 N.M. 500, 882 P.2d 541 (1994); *cf. Katz v. New Mexico Dep't of Human Servs., Income Support Div.*, 95 N.M. 530, 624 P.2d 39 (1981) (appeal of administrative ruling), and in this case, the Department admitted the jurisdictional allegations in Plaintiffs' complaint. Therefore, sovereign immunity does not shield the Department from appearing in court as a defendant in this case.

D.

(24) "Summary judgment is proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992); *see also* Rule 1-056(C) NMRA 1998. On appeal, the Department contends that the district court erred in entering summary judgment in Plaintiff's favor because there are genuine issues of material fact. In the district court, however, the Department filed its own motion for summary judgment, and also stipulated that "the[] parties agree that based upon this

record, this case is ripe for determination by summary judgment." In addition, the parties filed a lengthy set of stipulated facts. While some disputed facts not covered by these stipulations may remain, they do not preclude summary judgment without a showing that they are material. *See Tapia v. Springer Transfer Co.*, 106 N.M. 461, 463, 744 P.2d 1264, 1266 (Ct. App. 1987). The Department made no such showing here. *Cf. Spectron Dev. Lab. v. American Hollow Boring Co.*, 1997-NMCA-025, ¶ 32, 123 N.M. 170, 936 P.2d 852 (concluding that normal rules of preservation of error apply to appeals from summary judgments). Therefore, this issue does not provide a basis for reversal of the district court's order, and none of the threshold issues raised by the parties preclude this Court from ruling on the constitutionality of Rule 766.

III.

(25) We next address the merits of Plaintiffs' constitutional claims. Plaintiffs concede that the United States Constitution does not require the State to provide funding to Medicaid-eligible women for medically necessary abortions that fall outside the restrictions of the Hyde Amendment. *See Harris*, 448 U.S. at 316. Plaintiffs' arguments in the district court and on appeal are directed to the issue of whether the New Mexico Constitution affords greater protection than federal law. This issue was preserved below. *See State v. Gomez*, 1997-NMSC-006, ¶¶ 22, 23, 122 N.M. 777, 932 P.2d 1 (requirements for preserving state constitutional issue when parallel provision of federal constitution is involved); *cf. State v. Sarracino*, 1998-NMSC-022, ¶ 11, ___ NM ___, 964 P.2d 72 (discussing

preservation when there is no federal constitutional scheme from which to depart).

(26) At least twelve other states courts have published opinions addressing the question of whether state law requires funding for abortions for indigent women in situations where federal reimbursement is unavailable. In six of these states, the courts have determined that such funding is required under their state constitutions. *See Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 798-99 (Cal. 1981); *Doe v. Maher*, 515 A.2d 134, 162 (Conn. Super. Ct. 1986); *Moe v. Secretary of Admin. and Fin.*, 417 N.E.2d 387, 404 (Mass. 1981); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 32 (Minn. 1995); *Right to Choose v. Byrne*, 450 A.2d 925, 941 (N.J. 1982); *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 667 (W. Va. 1993). One court found that a state agency exceeded its statutory authority in restricting state funding for abortions. *See Planned Parenthood Ass'n, Inc. v. Department of Human Resources*, 687 P.2d 785, 792-93 (Or. 1984). Another court expressed disapproval of an agency rule restricting state funding for abortions in an opinion holding that a trial court abused its discretion in denying an award of attorney fees to plaintiffs who prevailed in their challenge to such restrictions. *See Roe v. Harris*, 917 P.2d 403, 407 (Idaho 1996). In four of the twelve states that have published opinions on the issue, however, the courts have not found provisions in their state constitutions that require state funding for abortions in situations where federal reimbursement is unavailable. *See Doe v. Department of Social Servs.*, 487 N.W.2d 166, 179-80 (Mich. 1992); *Hope v. Perales*, 634 N.E.2d 183, 188 (N.Y. 1994); *Rosie J. v. North Carolina Dep't of Human Resources*, 491 S.E.2d 535, 538

(N.C. 1997); *Fischer v. Department of Pub. Welfare*, 502 A.2d 114, 126 (Pa. 1985). Only two of the published opinions addressing the issue have analyzed whether state funding for abortions is required by a state's equal rights amendment, with conflicting results. *Compare Doe*, 515 A.2d at 162 (concluding that funding restrictions violate Connecticut's equal rights amendment) *with Fischer*, 502 A.2d at 126 (concluding that funding restrictions do not violate Pennsylvania's equal rights amendment).

(27) Our analysis focuses on the protection afforded by the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution in the situation where the Department has elected to provide medical assistance to needy persons. We first examine whether this provision of our state constitution establishes a basis for affording Medicaid-eligible women greater protection against gender discrimination than they receive under federal law. We conclude that it does. Next, we address the Department's claim that Rule 766 does not warrant heightened judicial scrutiny because it is based on a physical characteristic unique to one sex, namely the ability to become pregnant and bear children. We conclude that this unique physical characteristic does not exempt Rule 766 from a searching judicial inquiry under New Mexico's Equal Rights Amendment. We then examine whether Rule 766 operates to the disadvantage of women in the context of the State's Medicaid program, and we determine that Rule 766 is presumptively unconstitutional because it results in a program that does not apply the same standard of medical necessity to both men and women. Finally, we examine whether there is a compelling justification for treating men and women differently with

respect to their eligibility for medical assistance in this instance. Because such a compelling justification is lacking in this case, we conclude that rule 766 violates the New Mexico Constitution.

A.

(28) Neither the Hyde Amendment nor the federal authorities upholding the constitutionality of that amendment bar this Court from affording greater protection of the rights of Medicaid-eligible women under our state constitution in this instance. *See Gomez*, 1997-NMSC-006, ¶ 17; *Harris*, 448 U.S. at 311 n.16. Under this Court's "interstitial approach" to state constitutional interpretation, we "may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Gomez*, 1997-NMSC-006, ¶ 19; *see also State v. Gutierrez*, 116 N.M. 431, 440, 863 P.2d 1052, 1061 (1993) (describing this Court's "willingness to undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees"). In this case, we find distinctive state characteristics that render the federal equal-protection analysis inapposite with respect to Plaintiffs' claim of gender discrimination.

(29) Article II, Section 18 of the New Mexico Constitution guarantees that "[e]quality of rights under law shall not be denied on account of the sex of any person." This guarantee became part of our state constitution in 1973, after the people of New Mexico passed the Equal Rights Amendment by an overwhelming margin. *See* Richard H.

Folmar, *Piecemeal Amendment of the New Mexico Constitution: 1911 to 1990*, at 28 tbl.I, 34 tbl.IV (13th rev., New Mexico Legis. Council serv., 1991). There is no counterpart to New Mexico's Equal Rights Amendment in the United States Constitution. Indeed, the absence of such an amendment to the United States Constitution appears to have been a significant factor in the development of federal law applying the Equal Protection Clause to gender discrimination claims. *See Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring in the judgment) (pending ratification process for federal equal rights amendment provides "reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny"); *People v. Ellis*, 311 N.E.2d 98, 101 (Ill. 1974) (noting relationship between *Frontiero* and equal rights amendment). This lack of a federal counterpart to New Mexico's Equal Rights amendment renders the federal equal protection analysis inapposite in this case.

(30) Prior to 1973, Article II, Section 18 of the New Mexico Constitution contained only the following sentence: "No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws." The Equal Rights Amendment added a new sentence to this provision of our state constitution: "Equality of rights under law shall not be denied on account of the sex of any person." We construe the intent of this amendment as providing something beyond that already afforded by the general language of the Equal Protection Clause. *See Doe*, 515 A.2d at 160-61 ("To equate our [equal rights amendment] with the equal protection clause of the federal constitution would

negate its meaning given that our state adopted an [equal rights amendment] while the federal government failed to do so."); *Ellis*, 311 N.E.2d at 101 ("[W]e find inescapable the conclusion that [our equal rights amendment] was intended to supplement and expand the guaranties of the equal protection provision of the Bill of Rights[.]"); *Darrin v. Gould*, 540 P.2d 882, 889 (Wash. 1975) (en banc) ("Any other view would mean the people intended to accomplish no change in the existing constitutional law governing sex discrimination" when they enacted an equal rights amendment); *cf. Hannett v. Jones*, 104 N.M. 392, 395, 722 P.2d 643, 646 (1986) ("[C]onstitutions must be construed so that no part is rendered surplusage or superfluous[.]").

(31) We do not base our analysis on a mere textual difference between the federal and state constitutions. *Cf. Gomez*, 1997-NMSC-006, ¶ 17 (indicating that textual differences are not necessary prerequisites to affording broader protection under the New Mexico Constitution (citing *State ex rel. Sema v. Hodges*, 89 N.M. 351, 356, 552 P.2d 787, 792 (1976)). Rather, we view New Mexico's Equal Rights Amendment as the culmination of a series of state constitutional amendments that reflect an evolving concept of gender equality in this state. A review of the history of these amendments informs our analysis.

(32) From its inception, our state constitution has recognized that "[a]ll persons are born equally free." N.M. Const. art. II, § 4. The provisions in our state constitution prohibiting discrimination on account of sex, however, have developed in a piecemeal fashion. At the time the New Mexico Constitution was drafted in 1910, the rights of women to vote and participate in public life were a

topic of debate and compromise. *See* Reuben W. Heflin, *New Mexico Constitutional Convention*, 21 N.M. Hist. Rev. 60, 67 (1946); Edward D. Tittmann, *New Mexico Constitutional Convention: Recollections*, 27 N.M. Hist. Rev. 177, 182 (1952). While Congress only extended the right to vote and hold public office to "every free white male inhabitant" when it established the Territory of New Mexico in 1850, *see* Organic Act Establishing the Territory of New Mexico, ch. 49, § 6, 9 Stat. 446, 449 (1850) (compiled in NMSA 1978, vol. 1, Territorial Laws and Treaties), in 1914 this Court noted that the territorial government had appointed women to hold various public offices, *see State v. Chaves de Armijo*, 18 N.M. 646, 663-64, 140 P. 1123, 1129 (1914). In addition, "[t]he Supreme Court of the Territory, in 1908, admitted a woman to practice law in the Territory and [cerca 1889] a woman was admitted to the bar at Las Vegas." *Id.* at 663, 140 P. at 1129.

(33) The original state constitution that became law in 1912, however, only gave women the right to vote in school elections and to hold the office of county school superintendent, school director, board of education member, notary public, and "such other appointive offices as may be provided by law." N.M. Const. art. XX, § 11; *id.* art. VII, § 2 (prior to 1921 amendment). In 1913, the Legislature provided that "women may hold any appointive office in the state of New Mexico." 1913 N.M. Laws, ch. 60. Following the passage of the Nineteenth Amendment to the United States Constitution, which gave women the unconditional right to vote in federal and state elections, Article VII, Section 2 of the New Mexico Constitution was amended in 1921 to state that "[t]he right to hold public office in New Mexico shall not be

denied or abridged on account of sex, and wherever the masculine gender is used in this constitution, in defining the qualifications for specific offices, it shall be construed to include the feminine gender." *See* Folmar, *supra*, at 22 tbl. I.

(34) Despite these developments, many of the State's early laws continued to reflect the common-law view "that women were incapable mentally of exercising judgment and discretion and were classed with children, lunatics, idiots, and aliens insofar as their political rights were concerned." *Chaves de Armijo*, 18 N.M. at 659, 140 P. at 1127; *see also* Anne K. Bingaman, *The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control*, 3 N.M. L. Rev. 11, 56 (1973) (noting early community property laws that "reflect[ed] the attitudes of an era when married women were expected to rear children, care for home and husband, and do nothing else"). For example, the State's early marriage laws provided that "[t]he husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto." NMSA 1953, § 57-2-2 (1907) (repealed 1973); *see also* NMSA 1953, § 57-4-3 (1927) (repealed 1973) (granting husbands the exclusive right to manage and control personal property shared by their wives under the state's community property laws).

(35) Many of these early laws were repealed or amended in direct response to the passage of the Equal Rights Amendment in 1972. *See, e.g.*, 1973 N.M. Laws, ch. 58, § 1 (revising the definition of "unlawful discriminatory practice" under the New Mexico Human Rights Act, NMSA 1978, § 28-1-7 (1995), to expand prohibitions on

sex discrimination); Anne K. Bingaman, *The Community Property Act of 1973: A Commentary and Quasi-Legislative History*, 5 N.M. L. Rev. 1 (1974) (reviewing changes in community property law occasioned by passage of the Equal Rights Amendment); Folmar, *supra*, at 28 tbl. 1 (noting that Article VIII, Section 5 of the New Mexico Constitution was amended in 1973 to remove gender-based restrictions on veterans' property tax exemptions); Lisa Dawgert Waggoner, *New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption*, 22 N.M. L. Rev. 551, 561 (1992) (describing changes to the definition of criminal sexual offenses in response to the Equal Rights Amendment). New Mexico courts also have relied upon the Equal Rights Amendment and the statutory changes that followed in its wake. *See, e.g., State v. Gonzales*, 111 N.M. 590, 599, 808 P. 2d 40, 49 (Ct. App. 1991) (Equal Rights Amendment makes it "clear beyond cavil that discrimination on the basis of gender in the use of peremptory challenges [to strike jurors in a criminal case] is prohibited in New Mexico"); *Behrmann v. Phototron Corp.*, 110 N.M. 323, 328, 795 P.2d 1015, 1020 (1990) (affirming a jury verdict in favor of an employee who claimed that termination of her employment because of her pregnancy was an unlawful discriminatory practice under Section 28-1-7).

(36) Based on our review of the text and history of our state constitution, we conclude that New Mexico's Equal Rights Amendment is a specific prohibition that provides a legal remedy for the invidious consequences of the gender-based discrimination that prevailed under the common law and civil law traditions that preceded it. As such, the Equal Rights Amendment requires a searching

judicial inquiry concerning state laws that employ gender-based classifications. This inquiry must begin from the premise that such classifications are presumptively unconstitutional, and it is the State's burden to rebut this presumption.

(37) Although we recognize that federal courts currently apply an intermediate level of scrutiny to gender-based classifications, *see United States v. Virginia*, 518 U.S. 515, 532-34 (1996), our rationale for conducting a searching judicial inquiry regarding such classifications under the New Mexico Constitution may accord with the criteria for invoking more stringent judicial scrutiny under federal law, *see United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (noting that heightened scrutiny may be appropriate "when legislation appears on its face to be within a specific prohibition of the Constitution"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) ("history of purposeful unequal treatment" is one of "traditional indicia" of suspect classification requiring strict scrutiny under federal law); *Marrujo v. New Mexico State Highway Transp. Dep't*, 118 N.M. 753, 757, 887 P.2d 747, 751 (1994) (noting circumstances in which strict scrutiny applies); *cf. Opinion of the Justices to the House of Representatives*, 371 N.E.2d 426, 428 (Mass. 1977) ("To use a standard . . . which requires any less than the strict scrutiny test would negate the purpose of the equal rights amendment and the intention of the people in adopting it."). Thus, as we explain below, our analysis is not inextricably tied to the standard of review employed by the federal courts. *Cf. Gutierrez*, 116 N.M. at 435-36, 863 P.2d at 1056-57 (in interpreting state constitutional guarantees,

New Mexico courts may seek guidance from decisions of federal courts without being bound by those decisions).

B.

(38) The Department asserts that heightened scrutiny is not warranted in this case because Rule 766 employs a classification based on a "physical condition" with respect to which men and women are not similarly situated. *See Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974); *Fischer*, 502 A.2d at 125-26. We agree that not all classifications based on physical characteristics unique to one sex are instances of invidious discrimination. A flat prohibition of such classifications may lead to "absurd results." *See generally* Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 893-94 (1971); Ruth Bader Ginsburg, *Gender and the Constitution*, 44 Univ. Cin. L. Rev. 1, 37 (1975). For this reason, the presumption that gender-based classifications violate New Mexico's Equal Rights Amendment is not irrebuttable, and our heightened scrutiny need not be "fatal in fact." *Cf. Virginia*, 518 U.S. at 533 n.6 (observing that "strict scrutiny of [classifications based on race or national origin] is not inevitably 'fatal in fact' ").

(39) It would be error, however, to conclude that men and women are not similarly situated with respect to a classification simply because the classifying trait is a physical condition unique to one sex. In this context, " 'similarly situated' cannot mean simply 'similar in the possession of the classifying trait.' All members of any

class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test." Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws,* 37 Cal. L. Rev. 341, 345 (1949). It is equally erroneous to rely on the notion that a classification based on a unique physical characteristic is reasonable simply because it corresponds to some "natural" grouping. *See id.* at 346. We find this error present in an analysis which reasons that laws affecting only the members of one sex may be justified by "certain immutable facts of life which no amount of legislation may change." *Fischer,* 502 A.2d at 125.

(40) To determine whether men and women are similarly situated with respect to a classification, "we must look beyond the classification to the purpose of the law." Tussman & tenBroek, *supra,* at 346. Further, to determine whether a classification based on a physical characteristic unique to one sex results in the denial of "equality of rights under law" within the meaning of New Mexico's Equal Rights Amendment, we must ascertain whether the classification "operates to the disadvantage of persons so classified." Ginsburg, *supra,* at 37-38; *see also* Brown et al., *supra,* at 894 (noting danger that rule based on unique physical characteristic "could be used to justify laws that in overall effect seriously discriminate against one sex"); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy),* 92 Colum. L. Rev. 1, 33 (1992) ("The question at hand is whether government has the power to turn th[e] capacity [to bear children], limited as it is to one gender, into a source of social disadvantage."); Laurence H. Tribe, *American Constitutional Law* § 16-29, at 1584 (2d ed. 1988)

("[T]he fundamental problem is [the] willingness to transmute woman's 'real' biological difference to woman's disadvantage.").

(41) In making these determinations, we cannot ignore the fact that "[s]ince time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them." *Doe*, 515 A.2d at 159. Further, history teaches that lawmakers often have attempted to justify gender-based discrimination on the grounds that it is "benign" or "protective" of women. *See generally Ginsburg, supra*, at 2-7; *cf. Frontiero*, 411 U.S. at 684 (plurality opinion) (discussing "attitude of 'romantic paternalism' "). For example, as a basis for imposing restrictions on women's ability to work and participate in public life, courts have accepted at face value a desire of lawmakers to protect women from "ugliness and depravity," *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 132 (1994), "a legislative solicitude for the moral and physical well-being of women," *Goesaert v. Cleary*, 335 U.S. 464, 468 (1948) (Rutledge, J., dissenting), *overruling recognized by Payne v. Tennessee*, 501 U.S. 808, 828 n.1 (1991), including the need to protect a woman's "physical structure and a proper discharge of her maternal functions," *Muller v. Oregon*, 208 U.S. 412, 422 (1908), and the rationale that "woman is still regarded as the center of home and family life," *Hoyt v. Florida*, 368 U.S. 57, 62 (1961), *overruling recognized by Payne*, 501 U.S. at 829 n.1.

(42) We also note that some physical characteristics, such as the ability to become pregnant, may have profound health consequences. For example, there is undisputed evidence in the record that carrying a pregnancy to term may aggravate pre-existing conditions such as heart

disease, epilepsy, diabetes, hypertension, anemia, cancer, and various psychiatric disorders. According to these sources, pregnancy also can hamper the diagnosis or treatment of a serious medical condition, as when a pregnant woman cannot receive chemotherapy to treat her cancer, or cannot take psychotropic medication to control symptoms of her mental illness, because such treatment will damage the fetus. The evidence presented in this case concerning the health consequences of pregnancy accords with the expert medical testimony presented in other cases. *See, e.g., Doe*, 515 A.2d at 142; *Moe*, 417 N.E.2d 387, 393 n.10.

(43) In light of these factors, we conclude that classifications based on the unique ability of women to become pregnant and bear children are not exempt from a searching judicial inquiry under the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution. New Mexico's state constitution requires the State to provide a compelling justification for using such classifications to the disadvantage of the persons they classify.

C.

(44) Looking "beyond the classification to the purpose of the law," Tussman & tenBroek, supra, at 346, it is apparent that men and women who meet the Department's general criteria regarding financial and medical need are similarly situated with respect to their eligibility for medical assistance in this case. The basic objective of Title XIX of the federal Social Security Act is to provide qualified individuals with necessary medical care. *See* 42 U.S.C. § 1396; *Hern*, 57 F.3d at 910-11. Likewise, "[t]he

mission of the New Mexico Medical Assistance Division is to maximize the health status of Medicaid-eligible individuals by furnishing payment for quality health services at levels comparable to private health plans." 8 NMAC 4.MAD.002.

(45) While Title XIX gives the State some flexibility to determine the extent of coverage for the required categories of medical services, several federal courts, including the Tenth Circuit, have "interpreted Title XIX and its accompanying regulations as imposing a general obligation on [participating] states to fund those mandatory coverage services that are medically necessary." *Hern*, 57 F.3d at 911.[4] Apart from the restrictions on federal funding imposed by the Hyde Amendment, "[a]bortion falls under several of these 'mandatory coverage' categories." *Id.* at 910. Further, the mandatory coverage services available under state law generally rely on the standard of medical necessity. *See* 8 NMAC 4.MAD.601 (providing for services "which are medically necessary for the diagnosis and/or treatment of illnesses, injuries, or conditions of recipients").

(46) Except in the cases of rape or incest, or when necessary to save the life of the mother, Rule 766 denies state

---

[4] We recognize that the Second Circuit disagrees with this interpretation to the extent it implies that a participating state is required to provide certain kinds of durable medical equipment to every Medicaid-eligible individual who has a rare condition or unusual need. *See Desario v. Thomas*, 139 F.3d 80, 96 (2d Cir. 1998). The present case, however, does not involve benefits of the kind requested by the *Desario* plaintiffs, and the defendant in *Desario* is a state that has been ordered to provide medically necessary abortions to comply with its state constitution. *See Doe*, 515 A.2d at 162.

funding for abortions even when they are medically necessary. Under the Department's regulations, there is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to men. Indeed, we can find no provision in the Department's regulations that disfavors any comparable, medically necessary procedure unique to the male anatomy. For example, the Department does not explicitly condition reimbursement for any covered health service for income-eligible men on a physician's certification that the care is necessary to save the life of the patient.

(47) Thus, Rule 766 undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women. *See Geduldig*, 417 U.S. at 501 (Brennan, J., dissenting); Sunstein, *supra*, at 32-33. "Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical[ly necessary] expenses are paid by the state for both men and women is sex oriented discrimination." *Doe*, 515 A.2d at 159. We determine that Rule 766 employs a gender-based classification that operates to the disadvantage of women and is therefore presumptively unconstitutional. In order to survive the heightened scrutiny that we apply to such classifications, the State must meet its burden of showing that Rule 766 is supported by a compelling justification.

D.

(48) The Department asserts that the restriction on medically necessary abortions imposed by Rule 766 serves the State's interests in two ways. First, the Department claims

that Rule 766 is a legitimate cost-saving measure. In this regard, we acknowledge that courts very rarely require the government to fund its citizens' exercise of their constitutional rights. *See Harris*, 448 U.S. at 316-18 (federal government is not required to fund a woman's exercise of her constitutional right to abortion); *Howell*, 118 N.M. at 506, 882 P.2d at 547 (concluding that there is no fundamental right to receive public assistance). But that is not to say that when the Department elects to provide medically necessary services to indigent persons, it can do so in a way that discriminates against some recipients on account of their gender.

(49) The Department fails to offer a sufficiently compelling justification for such discrimination in this case. To be sure, Rule 766 may prevent the State from incurring the cost of funding medically necessary abortions not covered by the Hyde Amendment. But the Department's assertion "that it saves money when it declines to pay the cost of a [Medicaid-eligible woman's medically necessary] abortion is simply contrary to undisputed facts." *Maher v. Roe*, 432 U.S. 464, 490 (1977) (Brennan, J., dissenting) (citation omitted).

(50) Pregnant women who qualify for medical assistance from the Department are, by definition, unable to pay for their own medical expenses. Such women have only a limited period of time to obtain a safe, relatively inexpensive abortion after discovering that they are pregnant. The expense of obtaining an abortion increases two to six times in the second trimester. Further, it is not unreasonable to infer that the conditions which make an abortion medically necessary also may have a disabling effect on a pregnant woman's earning capacity. For these

reasons, we cannot assume that Medicaid-eligible women are likely to obtain medically necessary abortions with private funds when they are denied state funding under Rule 766.

(51) Indeed, such a result would be incompatible with the second interest asserted by the Department – protecting the potential life of the unborn. If Rule 766 only succeeded in shifting the burden of paying for abortion services to the private sector, then it would lose its effect of preserving potential life. Thus, in order to account for the second interest asserted by the Department, we must assume that the Department stands ready to accept an increase in the cost of other forms of medical assistance to which Medicaid-eligible pregnant women are entitled when they are denied medically necessary abortions.

(52) Under this scenario, for every woman who is denied state funding for a medically necessary abortion, we must assume the Department will be obligated to contribute a significant portion of the funds used to pay for medical expenses associated with bringing a pregnancy to term.[5] These expenses may include the cost of providing midwife services, *see* 8 NMAC.718.1, case management services for pregnant women and their infants, *see* 8 NMAC 4.MAD.772 (May 15, 1996), coverage for

---

[5] Under Title XIX, the federal government generally reimburses between 50 and 83 percent of a participating state's expenses for providing medical assistance. *See* 42 U.S.C. § 1396d(b)(1). For certain services, however, this percentage may be higher. *See, e.g., id.* § 1396b(a)(5) (federal government provides 90% reimbursement for sums attributable to family planning services and supplies).

newborn infants, *see* 8 NMAC4.NBN.400, and other pregnancy-related services, *see* 8 NMAC 4.PSO.400; 8 NMAC 4.PWN.400. In addition, the Department in some cases may have to cover medical treatment necessary to control the aggravation of pre-existing conditions that, according to Plaintiffs' allegations, would render an abortion medically necessary. *See* 42 C.F.R. § 440.210(a)(2) (1997) (mandatory coverage for "other conditions that might complicate the pregnancy"). It is undisputed that the State's expenses associated with bringing a pregnancy to term generally are much greater than its expenses associated with providing a medically necessary abortion.[6] For these reasons, we cannot conclude that Rule 766 serves as the least restrictive means of reducing the State's costs of providing medical assistance.

(53) We next consider whether, apart from its financial impact, Rule 766 serves as the least restrictive means of advancing the State's interest in the potential life of the

---

[6] According to the parties' stipulations, an abortion in the early stages of pregnancy costs between $275 and $350. From January to November 1994, the Department paid for 45 abortions at a cost of $11,009.25. From December 1994 to May 1995, the Department paid for 161 abortions at a cost of $25,785.60. In contrast, the Department paid $23,528,032.61 in hospital costs to provide labor and delivery services to 14,222 women from January to December 1994, for an average cost of $1,654.34 per woman. This figure does not include the amount paid for other pregnancy-related services. Thus, even if the federal government reimbursed the Department for 90% of the costs of bringing a pregnancy to term, the related costs incurred by the State would remain comparable to, if not higher than, the amount the State expended per pregnancy for medically necessary abortions during the same time frame.

unborn. Under federal law, the State's interest in the potential life of the unborn is never compelling enough to outweigh the interest in the life and health of the mother. *See Roe v. Wade*, 410 U.S. 113, 164-65 (1973); *Planned parenthood v. Casey*, 505 U.S. 833, 879 (1992) (plurality opinion); *Doe*, 515 A.2d at 157. Assuming, however, that at some late stage of a woman's pregnancy the State's interest becomes sufficiently compelling to support the denial of public funding, Rule 766 is not the least restrictive means of advancing this interest because it prohibits state funding for most medically necessary abortions at all stages of a woman's pregnancy and without regard to her health except in life-threatening situations. Further, according to the parties' stipulated facts, Rule 766 also may deny coverage for an abortion even when it is determined that the fetus will not be viable because it suffers from a fatal physical or mental impairment.

(54) For these reasons, we conclude that Rule 766 is not the least restrictive means to advance the State's interest in the potential life of the unborn at a point when that interest may become compelling. Further, because the State fails to provide a compelling justification for treating men and women differently with respect to their medical needs in this instance, we conclude that Rule 766 violates the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution.

IV.

(55) We next address the Department's claim that the district court lacks the authority to remedy this constitutional violation by ordering the State to pay for medically

necessary abortions for Medicaid-eligible women. According to the Department, the district court's order is inconsistent with the requirements of section 27-2-12 of the Public Assistance Act and the provisions in the New Mexico Constitution regarding the separation of powers.

(56) Section 27-2-12 provides that:

> Consistent with the federal act and subject to the appropriation and availability of federal and state funds, the medical assistance division of the human services department may by regulation provide medical assistance, including the services of licensed doctors of oriental medicine and licensed chiropractors, to persons eligible for public assistance programs under the federal act.

The Department claims this language means that it cannot provide any medical assistance for which federal reimbursement is unavailable. Thus, according to the Department, the district court violated the Public Assistance Act and exceeded its constitutional powers by enacting law and appropriating state funds for such medical assistance in the case of medically necessary abortions that fall outside the restrictions in the Hyde Amendment. *See* N.M. Const. art. III § 1 (providing for separation of powers); *id.* art. IV, § 1 (vesting legislative power in the Senate and the House of Representatives); *id.* art. IV, § 30 (limiting payments from the treasury to appropriations by the Legislature).

(57) We do not agree with the Department's proposed construction of Section 27-2-12 of the Public Assistance Act. Section 27-2-12 does not expressly prohibit funding medically necessary abortions for Medicaid-eligible

women, nor does it explicitly state that funding for this particular medical procedure is contingent on federal reimbursement. Indeed, the Legislature has considered and rejected such language. *See* S. 52, 42d Leg., 1st Sess. (N.M. 1995); H.R. 76, 42d Leg., 1st Sess. (N.M. 1995). Unlike the specific restriction on the availability of federal funds for abortions imposed by Congress in the Hyde Amendment, New Mexico's Public Assistance Act only contains general language delegating rulemaking authority to the Department and setting limits on that authority with respect to the State's medical assistance program. Thus, we cannot say the funding restrictions in Rule 766 are compelled by the plain meaning of Section 27-2-12. *See State ex rel. Helman v. Gallegos*, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994) (noting circumstances under which the plain-meaning rule does not apply).

(58) In this case, the Department's power to adjust the distribution of state funds under the medical assistance provisions of the Public Assistance Act in order to comply with the Bill of Rights guaranteed by the New Mexico Constitution "arise[s] from the statutory language by fair and necessary implication." *Howell*, 118 N.M. at 504, 882 P.2d at 545. The basic purpose of Section 27-2-12 is to ensure that, if New Mexico is going to participate in the federal Medicaid program, the State's plan must provide for the categories of medical assistance and the level of state funding that are required to main eligible for federal financial assistance under Title XIX of the Social Security Act. *Cf.* 42 U.S.C. § 1396a(a)(10) (requiring state plan to provide categories of medical assistance listed under 42 U.S.C. §§ 1396d(a)(1) to (5), (17), (21)); *id.* § 1396a(a)(2) (requiring state plan to provide for financial participation

by the State); *id.* § 1396c (providing for discontinuation of federal payments if state plan does not comply with these federal requirements). But this linkage to "[f]ederal law cannot enlarge state executive power beyond that conferred by the state constitution." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 42, ___ N.M. ___, 961 P.2d 768. Where, as here, state funds within the Department's control are used in a manner that does not conflict with federal law in order to fulfill the fundamental guarantees of our state constitution, we cannot say that section 27-2-12 has been violated. *Cf. Boley v. Miller*, 418 S.E.2d 352, 358 (W. Va. 1992) (refusing to construe state medical assistance statute as prohibiting use of state funds to pay for abortions that did not qualify for federal matching funds); *Dodge v. Department of Soc. Servs.*, 657 P.2d 969, 975-76 (Colo. Ct. App. 1982) (same).

(59) Our conclusion that the district court's order does not violate Section 27-2-12 also disposes of the Department's claim that the district court violated the provisions in our state constitution requiring separation of powers. In requiring the Department to disburse state funds appropriated by the Legislature in a manner consistent with the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution, the district court did not usurp the Legislature's power to enact new laws or appropriate funds. *See Moe*, 417 N.E.2d at 395; *Dodge*, 657 P.2d at 973-75; *Georgia by Dep't of Med. Assistance v. Heckler*, 768 F.2d 1293, 1296 (11th Cir. 1985). " 'It is a function of the judiciary when its jurisdiction is properly invoked to measure the acts of the executive and the legislative branch solely by the yardstick of the constitution.' " *State ex rel. Clark*, 120 N.M. at 570, 904 P.2d at 19

(quoting *State ex rel. Hovey Concrete Prods. Co. v. Mechem*, 63 N.M. 250, 252, 316 P.2d 1069, 1070 (1957)). The district court did not exceed its power in performing that function here.

(60) The Department's final contention is that a permanent injunction is not warranted because Plaintiffs have not established that they will suffer irreparable injury if Rule 766 is implemented or that granting an injunction is not adverse to the public interest. *See National Trust for Historic Preservation*, 117 N.M. at 595, 874 P.2d at 803 (listing requirements for preliminary injunction). These assertions, however, rely on the Department's arguments regarding standing and separation of powers, which we have rejected earlier in this opinion. Therefore, we conclude that the district court did not err in permanently enjoining the Department from enforcing Rule 766. *Cf. Doe*, 515 A.2d at 162 (finding that enforcement of abortion regulation would cause irreparable injury and granting injunctive relief).

V.

(61) Based on the independent grounds provided by the Equal Rights Amendment to Article II Section 18 of the New Mexico Constitution, we affirm the district court's orders granting Plaintiffs' motion for summary judgment, permanently enjoining the Department from enforcing its May 1995 revision of Rule 766, and awarding costs to Plaintiffs. We reverse the district court's orders granting Klecan and Schaurete's motion to intervene for failure to comply with the requirements of Rule 1-024(A)(2). Because we have previously granted a stay of Plaintiffs'

cross-appeal with respect to the issue of attorney fees, we defer ruling on that issue or the award of costs on appeal until further order of this Court.

(62) **IT IS SO ORDERED.**

/s/ Pamela B. Minzner
PAMELA B. MINZNER, Justice

WE CONCUR:

/s/ Gene E. Franchini
GENE E. FRANCHINI, Chief Justice

/s/ Joseph F. Baca
JOSEPH F. BACA, Justice

/s/ Dan A. McKinnon, III
DAN A. McKINNON, III, Justice

/s/ M. Christina Armijo
M. CHRISTINA ARMIJO, Judge,
New Mexico Court of Appeals
(sitting by designation)

EXHIBIT 2

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. SF95-867(c)

NEW MEXICO RIGHT TO CHOOSE/NARAL; ABORTION AND REPRODUCTIVE HEALTH SERVICES; PLANNED PARENTHOOD OF THE RIO GRANDE; CURTIS BOYD, M.D.; LUCIA CIES, M.D.; BRUCE FERGUSON, M.D.; and LEWIS H. KOPLIK, M.D.,

Plaintiffs,

v.

DOROTHY DANFELSER, Secretary of the New Mexico Human Services Department,

Defendant.

COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND DECLARATORY JUDGMENT

I.

JURISDICTION AND VENUE

(Filed Apr. 21, 1995)

1. This is an action for declaratory and injunctive relief brought pursuant to N.M. Stat. Ann. § 44-6-1 to § 44-6-15 (Repl. Pampl. 1978), the New Mexico Declaratory Judgment Act. An actual controversy exists between the parties because the New Mexico Human Services Department has promulgated a regulation, scheduled to

take effect May 1, 1995, that violates Plaintiffs' state constitutional rights. The regulation prohibits Medicaid funding of all abortions except those necessary because the pregnancy is life-threatening or results from rape or incest. Final Regulation Governing Pregnancy Termination Procedures, N.M. Human Serv. Reg., April 18, 1995 (to be codified as Regulation 766) ["the challenged regulation"]. Medicaid-eligible women who carry to term will continue to receive coverage for pregnancy-related care when medically necessary.

2. The Medical Assistance Program's discriminatory funding scheme burdens the exercise of the rights of privacy, reproductive choice, equality, and health, in violation of the New Mexico Constitution. N.M. Const. art. II, §§ 4 (inherent rights), 18 (due process, equal protection, equal rights amendment).

3. Jurisdiction is conferred on this Court by N.M. Const. art. VI, § 13; N.M. Stat. Ann. § 38-3-1.1 (Cum. Supp. 1994); § 44-6-2 (Repl. Pamp. 1978). Venue is proper in this judicial district pursuant to N.M. Stat. Ann. § 38-3-1(G) (Cum. Supp. 1994).

II.

PARTIES

A. Plaintiffs

4. Plaintiff New Mexico Right to Choose/NARAL (NM Right to Choose), located in Bernalillo County, New Mexico, is a not-for-profit, statewide organization dedicated to preserving and promoting the right of reproductive choice in New Mexico. NM Right to Choose has

among its members women of childbearing age who are eligible for medical assistance and who may during the pendency of this lawsuit seek medically necessary abortions. In this action, NM Right to Choose asserts its own interest as an advocacy organization and the interests of its members who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

5. Plaintiff Abortion & Reproductive Health Services (ARHS) is a nonprofit reproductive health care facility in Albuquerque, New Mexico, that provides reproductive health services, including abortion. Many of ARHS' patients who seek abortions are eligible or certified for Medicaid. ARHS on occasion waives or reduces its fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, ARHS asserts its own interests and the interests of its patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

6. Plaintiff Planned Parenthood of the Rio Grande (PPRG) is a New Mexico nonprofit corporation. PPRG operates two reproductive health care facilities in Albuquerque, New Mexico, a reproductive health care facility in Santa Fe, New Mexico, and an education and referral office in Taos, New Mexico. Although PPRG does not provide abortions, it offers counseling and referral on pregnancy options, including prenatal care, adoption,

and abortion. The majority of PPRG's clients are eligible or certified for Medicaid. PPRG loans funds to women who need but cannot afford abortions, including those denied state assistance. In this action, PPRG asserts its own interests and the interests of its patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

7. Plaintiff Curtis Boyd, M.D., is a physician providing reproductive health services, including abortion, in his private practice in Albuquerque, New Mexico. Many of his patients who seek abortions are eligible or certified for Medicaid. Dr. Boyd on occasion waives or reduces his fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, Dr. Boyd asserts his own interests and the interests of his patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

8. Plaintiff Lucia Gies, M.D., is a physician providing reproductive health care services, including abortion, in her family practice in Santa Fe, New Mexico. Many of her patients who seek abortions are eligible or certified for Medicaid. Dr. Cies on occasion waives or reduces her fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, Dr. Cies asserts her own interests and the interests

of her patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

9. Plaintiff Bruce Ferguson, M.D., is a physician providing reproductive health care services, including abortion, in his private practice and at the Abortion & Reproductive Health Services Clinic, both of which are in Bernalillo County. Many of his patients who seek abortions are eligible or certified for Medicaid. Dr. Ferguson on occasion waives or reduces his fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, Dr. Ferguson asserts his own interests and the interests of his patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

10. Plaintiff Lewis Koplik, M.D., is a physician providing reproductive health care services, including abortion, in his private family practice and at Abortion and Reproductive Health Services, both of which are in Bernalillo County. Many of his patients who seek abortions are eligible or certified for Medicaid. Dr. Koplik on occasion waives or reduces his fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, Dr. Koplik asserts his own interests and the interests of his patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program,

but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

B. **Defendant**

11. Defendant Dorothy Danfelser is the Acting Secretary of the New Mexico Human Services Department ("the Department") and is sued in her official capacity. The Secretary of Human Services has the responsibility for administering, and for adopting and implementing regulations necessary to administer, the New Mexico Medical Assistance Program. N.M. Stat. Ann. § 27-1-2, 27-1-3 (Repl. Pampl. 1992).

III.

FACTUAL ALLEGATIONS

12. Medicaid is a joint federal-state entitlement program that provides medical assistance to the poor. 42 U.S.C.A. §§ 1396b(a)(1), 1396d(b) (West Supp. 1993). Federal law sets out mandatory and optional categories of services funded under Medicaid. 42 U.S.C.A. §§ 1396(a)(10), 1396(a) (West Supp. 1993).

13. As a condition of federal participation in a state's medical assistance program, Congress mandates that each state provide pregnancy-related benefits to women with family incomes up to 133% of the federal poverty level; federal financial participation remains available for such services up to 185% of the poverty level for states that either opt or are required to fund at this higher level. 42 U.S.C.A. § 1396a(1)(2)(A)(i), (ii), (iv) (West Supp. 1993).

14. Under the Hyde Amendment, federal Medicaid funds may be used to reimburse those abortions necessary to save a woman's life or where the pregnancy results from rape or incest. Pub. L. 103-333, 108 Stat. 2539, § 509 (1994). States remain free, however, to include abortions among those services reimbursed with state funds.

15. Consistent with the federal Medicaid statute, New Mexico has chosen to provide medical assistance to needy men and women in the State. N.M. Stat. Ann. §§ 27-2-12, 27-2-9 (Cum. Supp. 1994); State of New Mexico, *Medical Assistance Division Provider Manual* (Feb. 1, 1995). Benefits include physician, hospital, laboratory, hospice, reproductive health, and midwife services, among others. State of New Mexico, *Medical Assistance Division Provider Manual*, Regs. 602, 711.33, 718.1, 721, 762.3, 763 [hereinafter "MAD Reg.(s) ___"]. Pregnancy-related care is provided to women with family incomes below 185% of the federal poverty level, and pregnant women who are eligible for the Aid to Families with Dependent Children Program ("AFDC") can receive all services covered in the Medical Assistance Program. MAD Regs. 402.24, 402.21. New Mexico provides Medicaid funding for all covered services that are medically-necessary for Medicaid-eligible men.

16. On April 18, 1995, in the absence of a statutory mandate, the Department issued the challenged regulation scheduled to take effect May 1, 1995. That regulation provides for Medicaid funding for abortions only under the following circumstances:

a. The life of the recipient will be endangered should the pregnancy be allowed to continue, as certified by the treating physician;

b. The procedure is required to terminate a pregnancy resulting from rape or incest, as certified by the treating physician and/or the appropriate reporting agency; or

c. The procedure is necessary for termination of an ectopic pregnancy. MAD Reg. 766. Transportation costs and other expenses associated with a non-covered abortion are themselves non-reimbursable. MAD Reg. 605.

17. With this challenged regulation, abortions will not be funded in the Medical Assistance Program in the same manner as are other pregnancy-related services. Coverage for prenatal care, labor and delivery costs, family planning, postpartum care, emergency room services, and diagnostic procedures will continue to be provided to Medicaid-eligible pregnant women whenever medically necessary. MAD Regs. 705.1, 762.

18. The challenged regulation will repeal a regulation which became effective on December 1, 1994. The December 1, 1994 regulation expanded Medicaid coverage of abortions to circumstances where the pregnancy was the result of rape or incest, and where the abortion was "medically necessary" as defined by the regulation. MAD Reg. 766. The December 1, 1994 regulation defines medical necessity to include only those abortions necessary because "the pregnancy aggravates a pre-existing condition, makes treatment of a condition impossible, interferes with or hampers a diagnosis, or has a profound negative impact upon the physical or mental health of an individual." MAD Reg. 766.4.

19. Under that regulation, state assistance for abortions in uniquely restricted. For other covered services, the definition of medical necessity is entrusted to the physician. MAD Regs. 705.1, 711.3. The December 1, 1994 regulation also conditions medical assistance for abortions for a minor on parental consent, except in those instances in which the abortion is lifesaving, the pregnancy results from rape or incest, or a physician and independent counselor certify that the minor is sufficiently mature to make the decision in her best interest in consultation with here physician. MAD Reg. 766.63. No other service covered by the Medical Assistance Program is subject to a similar requirement.

20. Prior to the December 1, 1994 regulation, Medicaid coverage for abortion was available where the pregnancy was life-threatening or resulted from rape or incest.

21. While pregnancy carries with it health and life risks for all women, the risks are particularly significant for women with preexisting health conditions, including hypertension, heart disease, cancer, diabetes, schizophrenia, and other physical and mental health disorders. Some women develop serious health problems because of their pregnancies, including gestational diabetes, pregnancy induced hypertension, and depression. Pregnancy presents particular health risks for young women, as well as risks to the physical and mental health of women in myriad other circumstances.

22. The challenged regulation will force physicians in New Mexico, when treating low-income pregnant women with these and other health problems, either to

perform medically indicated abortions for free, which many physicians cannot afford to do on any consistent basis, or to wait, closely monitoring the patient's deteriorating health, until she delivers or the pregnancy becomes life-threatening so that an abortion is reimbursable.

23. Access to an abortion provider is a problem for many Medicaid-eligible women in New Mexico, as abortions are performed in few counties. Without state assistance most Medicaid-eligible women have great difficulty paying for abortions, transportation and other related expenses. With the challenged regulation, Medicaid-eligible women will be forced to delay the procedure as they attempt to raise the money. Although abortion is safer than childbirth, the health risks associated with abortion increase significantly with delay.

24. Under the challenged regulation, many Medicaid-eligible women seeking abortions will be forced to carry pregnancies to term or pursue alternatives to legal abortion to end their pregnancies. Many will suffer foreseeable psychological and physical harm, as well as economic and other consequences.

25. There is no fiscal or other justification for the Defendant imposing these harms upon low-income women in New Mexico.

26. This suit is being brought by Plaintiffs against the Defendant because the Executive Branch of the State of New Mexico has refused to perform its duty to uphold the Constitution of the State of New Mexico and not to act in a manner that its unconstitutional. The Executive Branch through the Defendant has engaged in bad faith

and has willfully disregarded the constitutional rights of indigent women in the State of New Mexico.

V.

FIRST CAUSE OF ACTION; FOR VIOLATION OF THE STATE INHERENT RIGHTS CLAUSE

27. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 26 inclusive.

28. Article II, § 4 of the New Mexico Constitution provides: "All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness."

29. By denying eligible women coverage for abortions unless the pregnancy is life-threatening or results from rape or incest, while providing coverage for all other medical services related to childbirth, the challenged regulation violates Plaintiffs' inherent and inalienable rights of life, liberty, safety, and happiness by impermissibly infringing Plaintiffs' exercise of their reproductive choice guaranteed by the inherent rights clause.

VI.

SECOND CAUSE OF ACTION: FOR VIOLATION OF THE STATE DUE PROCESS CLAUSE

30. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 29 inclusive.

31. Article II, § 18 of the New Mexico Constitution (the "due process clause") provides in relevant part: No person "shall be deprived of life, liberty or property without due process of law."

32. By denying eligible women coverage for abortions unless the pregnancy is life-threatening or results from rape or incest, while providing coverage for all other medical services related to childbirth, the challenged regulation violates Plaintiffs' rights to privacy and reproductive choice guaranteed by the state due process clause.

VII.

THIRD CAUSE OF ACTION: FOR VIOLATION OF THE STATE EQUAL PROTECTION CLAUSE

33. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 32 inclusive.

34. Article II, § 18 of the New Mexico Constitution (the "state equal protection clause") provides in relevant part that no person "shall . . . be denied equal protection of the laws."

35. By denying eligible women coverage for abortions unless the pregnancy is life-threatening or results

from rape or incest, while providing coverage for all other medical services related to childbirth, the Defendant impermissibly discriminates between women who need medical care to carry a pregnancy to term and women who need medical care to terminate a pregnancy. This discrimination infringes a women's fundamental right to choose whether or not to continue a pregnancy, in violation of the state equal protection clause.

VIII.

FOURTH CAUSE OF ACTION: FOR VIOLATION OF THE STATE EQUAL PROTECTION CLAUSE

36. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 35 inclusive.

37. By denying coverage for abortions necessary to preserve a woman's health, providing coverage instead only when an abortion is necessary to save a woman's life or the pregnancy is a result of rape or incest, the Defendant creates a distinction between medically necessary and lifesaving procedures that is not substantially, or even rationally, related to any important government interest, in violation of the state equal protection clause.

IX.

FIFTH CAUSE OF ACTION: FOR VIOLATION OF THE STATE EQUAL RIGHTS AMENDMENT

38. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 37 inclusive.

39. Article II, § 18 of the New Mexico Constitution (the "state equal rights amendment") provides in relevant part, "[e]quality of rights under law shall not be denied on account of the sex of any person."

40. The state equal rights amendment prohibits discrimination on the basis of sex.

41. By providing medical assistance to eligible men whenever a covered service is medically necessary while providing abortions to eligible women only when the procedure is necessary to save their lives or when the pregnancy is a result of rape or incest, the challenged regulation imposes disparately severe restrictions on women's access to medically necessary care, in violation of the state equal rights amendment.

42. By denying eligible women coverage for abortions unless the pregnancy is life-threatening or results from rape or incest, while providing coverage for all other medical services related to childbirth, the challenged regulation violates the state's equal rights amendment.

WHEREFORE, Plaintiffs respectfully request that the Court:

1) temporarily restrain Defendant to preserve the status quo, by continuing to afford state Medicaid coverage consistent with the regulation adopted on December 1, 1994 and presently in effect, pending permanent relief ordering nondiscriminatory funding for abortion services in New Mexico's Medical Assistance Program;

2) preliminarily enjoin Defendant to preserve the status quo, by continuing to afford state

Medicaid coverage consistent with the regulation adopted on December 1, 1994 and presently in effect, pending permanent relief ordering nondiscriminatory funding for abortion services in new Mexico's Medical Assistance Program;

3) declare that women otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program are entitled under the New Mexico Constitution to nondiscriminatory funding of abortion services;

4) permanently enjoin enforcement of MAD Reg. 766, insofar as it denies state Medicaid coverage for medically necessary abortions or otherwise subjects abortion services to discriminatory treatment; and

5) grant such other and further relief as the Court may deem just and proper, including costs and attorneys' fees.

Respectfully submitted,

/s/ Maureen Sanders

Maureen Sanders
445 Carlisle Ave., NE
Albuquerque, NM 87106
(505) 268-9914

Ann Scales
1312 Delamar, NW
Albuquerque, NM 87107
(505) 344-4800

David Stout
Carpenter & Chavez, P.C.
1600 University Ave., NE, #B
Albuquerque, NM 87102-2124
(505) 243-1336

J. Michele Guttmann
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960

Philip B. Davis
Co-Legal Director,
ACLU of New Mexico
814 Marquette NW
Albuquerque, NM 87102
(505) 242-1904

/s/ Louise Melling
Louise Melling
Natalie Gomez
Reproductive Freedom Project
American Civil Liberties
Union Foundation
132 W. 43rd St., 7th Fl.
New York, NY 10036
(212) 944-9800

Catherine Albisa
Priscilla Smith
Center for Reproductive Law
& Policy
120 Wall St., 18th Fl.
New York, NY 10005
(212) 514-5534

Cynthia Fry
P.O. Drawer 40
Albuquerque, NM 87103
(505) 764-6039

Attorneys for Plaintiffs

Of Counsel:
Roger Evans
Legal Action for Reproductive
Rights Planned Parenthood
Federation of America
810 Seventh Avenue
New York, NY 10019
(212) 261-4708

EXHIBIT 3

NEW MEXICO HUMAN SERVICES DEPARTMENT

(SEAL) (LOGO)

HUMAN SERVICES REGISTER

I. DEPARTMENT

NEW MEXICO HUMAN SERVICES DEPARTMENT

II. SUBJECT

PREGNANCY TERMINATION PROCEDURES

III. PROGRAM AFFECTED

(TITLE XIX) MEDICAID

IV. ACTION

PROPOSED REGULATIONS

V. BACKGROUND SUMMARY

The New Mexico Human Services Register, Volume 17, No. 85, dated November 28, 1994, issued final regulations governing pregnancy termination procedures. These proposed regulations would revise the November 28, 1994 regulations to limit Medicaid coverage of abortions to those conditions reimbursed under federal law. They include:

1. the procedure is necessary to save the life of the mother,

2. the pregnancy is a result of rape or incest, or if not reported, the patient is not physically or emotionally able to report the incident; or

3. the procedure is necessary to terminate an ectopic pregnancy.

VI. REGULATIONS

These regulations will supersede regulations currently in section 766 Pregnancy Termination Procedures. A copy of the proposed regulations may be requested by contacting the Medical Assistance Division at 827-3100.

VII. EFFECTIVE DATE

The Department proposes to implement these regulations effective May 1, 1995.

VIII. PUBLIC HEARING

A public hearing to receive testimony on these proposed regulations will be held at 9:00 a.m., Friday, April 7, 1995 at Apodaca Hall in the PERA Building at the corner of Paseo de Peralta and Old Santa Fe Trail in Santa Fe, New Mexico. Parking accessible to persons with physical impairments will be available.

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in the public hearing, please contact the Department toll free at 1-800-432-6217, in Santa Fe at 827-9454, or through the New Mexico relay system, 1-800-659-8331. The Department requests at least 10 days advance notice to provide requested alternative formats and special accommodations.

IX. ADDRESS

Interested persons may address written or recorded comments to:

Eugene D. Lovato, PhD., Secretary
Human Services Department
P.O. Box 2348
Santa Fe, New Mexico 87504-2348

These comments must be received no later than 5:00 p.m., Friday, April 7, 1995. Written and recorded comments will be given the same consideration as oral comments made at the public hearing.

X. PUBLICATIONS

Publication of these regulations approved on February 20, 1995 by:

/s/ Eugene D. Lovato
EUGENE D. LOVATO,
PHD., SECRETARY
HUMAN SERVICES
DEPARTMENT 2-20-95

EXHIBIT 4

154 P.2d 257

ARNOLD v. STATE.

No. 4866.

Supreme Court of New Mexico.

Dec. 16, 1944.

Appeal from District Court, Santa Fe County; William J. Barker, Judge.

Suit by Herman Arnold against the State of New Mexico to have a statute declared unconstitutional. From a judgment overruling defendant's motion to dismiss the suit on ground that state was sued without its consent, defendant appeals.

Reversed and remanded with direction to sustain defendant's motion.

C. C. McCulloh, Atty. Gen., and Robert W. Ward, Asst. Atty. Gen., for appellant.

J. Benson Newell, of Las Cruces, for appellee.

SADLER, Chief Justice.

The decisive question, if answered negatively, is whether 1941 Comp. § 25-603 constitutes a general consent on the part of the state to be sued under the provisions of the Declaratory Judgments Act, L.1935, c. 143. Our former decision in Taos County Board of Education v. Sedillo, 44 N.M. 300, 101 P.2d 1027, supplies a negative answer to the question and we adhere to that decision on this appeal.

The plaintiff, who is appellee before this court, sued the state, securing service on the Governor and the Attorney General pursuant to Trial Court Rule 57(b), 1941 Comp. § 19-101, Rule 57(b). The petition disclosed that one Louise M. Arnold died on December 30, 1943, at Alamogordo, New Mexico, at the age of 92; that she was the widow of plaintiff's deceased brother and that the deceased husband and wife had acquired substantial real and personal community property during their marriage; that Louise M. Arnold had never remarried after the death of her husband; that during her lifetime and apparently after her husband's death she had executed a last will leaving practically her entire estate to the plaintiff but that all efforts to locate it had failed, the implication of the petition being that it had been secreted or destroyed by certain persons, husband and wife, who lived with decedent some months prior to her death and for whose benefit decedent had transferred substantially all her property in trust in exchange for their promise to care for, support and furnish her decent burial.

The petition further alleged that decedent had on deposit in a certain bank in Alamogordo at the time of her death, seemingly not subject to the trust, the sum of $500. It also alleged facts which, if true, would take certain personal property described in the trust deed, out from under the terms of the trust and render it, along with the cash in bank, subject to descent. Then, followed an allegation that under the provisions of 1941 Comp. § 31-116, purportedly repealed by L.1943, c. 17, there being no issue, where the surviving spouse shall die intestate as in this case, the community property of the marriage descends to the heirs of the husband and wife,

the implication being that he is the sole heir of the deceased husband. The repeal of section 31-116, under which the plaintiff hopes to inherit, was assailed upon the constitutional ground that the subject of the repealing act was not clearly expressed in the title in that it referred only to the specified section of the 1941 Compilation embracing the act sought to be repealed, in alleged violation of Art. IV, § 16 of the state constitution. The state's interest was made to rest on the allegation that if the repealing act was effective, then all property of the decedent, including the bank balance of $500, would escheat to the state in that she must be deemed to have died intestate and without heirs.

With this background, the plaintiff then set forth in a concluding paragraph of his petition the language relied upon to invoke relief under the Declaratory Judgments Act, as follows: "Plaintiff alleges that there is an actual existing controversy over the constitutionality of said Chap. 17 of the Laws of 1943, between him and the State of New Mexico, – the State contending that said law is constitutional and that a said Sec. 31-116 of the 1941 Code is repealed; and the plaintiff contending same is effective because of the unconstitutionality of the repealing act."

The state appeared by the Attorney General and filed its motion to dismiss, setting up several grounds, the first of which is as follows: "That plaintiff's petition shows on its face that this Court is without jurisdiction over the defendant in that defendant is the State of New Mexico and that plaintiff is attempting to sue the State of New Mexico without its consent."

In State ex rel. Evans v. Field, 27 N.M. 384, 201 P. 1059, 1060, we said: "It is a fundamental doctrine at common law and everywhere in America that no sovereign state can be sued in its own courts or in any other without its consent and permission."

Indeed, so fundamental is the lack of consent that it was treated as jurisdictional in the foregoing case and permitted to be raised for the first time in this court.

The plaintiff relies upon the following language found in 1941 Comp. § 25-603 of the Declaratory Judgments Act as constituting general consent on the part of the state to be sued under the provisions of the act, subject to the conditions therein stated, to-wit: "For the purpose of this act, the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico, or any statute thereof."

In Taos County Board of Education v. Sedillo, 44 N.M. 300, 101 P.2d 1027, 1032, in a case decided only a few years following enactment of this legislation, the likelihood that this language would soon be relied upon as constituting a general immunity on the part of the state to be sued under the provisions of the act was sensed. The matter was considered and we said: " * * * We take this first opportunity to correct any impression that section 3 of the act is a general consent on the part of the state to be sued under its provisions. We are agreed that it has no such meaning and has no greater effect, in so far as this consideration is concerned, than merely to permit parties to sue the state under the act where the state's

consent to be sued otherwise exists and the facts warrant suit."

It was a mooted question in that case whether section 3 of the act (25-603), which is not found in the uniform and federal Declaratory Judgments Acts, constitutes an enlargement of the jurisdiction to enter declaratory judgments in certain instances where the state or a state official is the defendant and the construction of the state constitution or a statute is called for. Apropos this question, we said:

" * * * On the one side it is argued that if not an enlargement of jurisdiction, its presence in the act is meaningless, suit against the state or state officials in the instances enumerated being maintainable under section 1 without the aid of section 3. * * *

"On the other hand it is said that instead of enlarging section 3 limits jurisdiction; that its purpose is two-fold: First, to remove any doubt about applicability of the act to the state and state officials where consent on the part of the state to be sued otherwise exists; and, second, to limit the right to have declarations, even in those instances, subject to the conditions named, to cases involving the construction of the state constitution or of some statute. We pass the question. Any present declaration we might make upon the subject would be gratuitous in view of the fact that we find jurisdiction to exist under section 1."

In Dougherty v. Vidal, 37 N.M. 256, 21 P.2d 90, 92, we said:

"Both legally and practically we consider the state's immunity from suit too important a matter to be trifled with. 'A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.' Mr. Justice Holmes, in Kawananakoa v. Polyblank, 205 U.S. 349, 27 S.Ct. 526, 527, 51 L.Ed. 834. The Legislature, not to mention the courts, should proceed slowly and with caution in subjecting the state itself to the exigencies of litigation. Langford v. United States, 101 U.S. [341], 11 Otto 341, 25 L.Ed. 1010.

"Moreover, a question of jurisdiction arises. This court is the creature of the sovereign state. It can have no natural or presumptive jurisdiction over its creator. Such jurisdiction as we have over the state we must trace to the Constitution or to that branch of government which declares the state's public policy. In the absence of plain consent, to entertain a suit against the state is judicial usurpation.

"Furthermore, 'It is usually said that statutes authorizing suits against the state are to be strictly construed, since they are in derogation of the state's sovereignty.' 59 C.J. 303, 25 R.C.L. 416, Lewis' Sutherland, St.Const. (2d Ed.) § 558."

Other New Mexico cases dealing generally with the subject of the state's immunity from suit are Looney v. Stryker, 31 N.M. 557, 249 P. 112, 50 A.L.R. 1404, and American Trust & Savings Bank of Albuquerque v.

Scobee, 29 N.M. 436, 224 P. 788. See, also, Annotations: 42 A.L.R. 477, 50 A.L.R. 1408.

Confronted, therefore, in Taos County Board of Education v. Sedillo, supra, with a statute which, if plaintiff's contention be correct, opens wide the door to suits against the state, and mindful of the strict construction with which such statutes are interpreted, we looked for another meaning than that which was suggested for it. And, other meanings appearing, as pointed out in the Sedillo case, supra, falling short of omnibus authority to sue the state, we inserted in the opinion in that case the cautionary language now so vigorously challenged by the plaintiff. We see no reason to repudiate it. The conclusion we reach is supported by the discussion to be found in Borchard on Declaratory Judgments (2d Ed.) 370-374.

It follows from what has been said that the judgment of the trial court should be reversed and the cause remanded with a direction to sustain defendant's motion to dismiss the suit as one against the state initiated without its consent.

It is so ordered.

MABRY, BRICE, BICKLEY, and THREET, JJ., concur.

EXHIBIT 5

Filed July 3, 1995 in Santa Fe District Court

RELIEF:

It is the opinion of this Court that MAD Reg. 766 is void and uneforceable [sic] in that it deprives indigent women of our state rights secured to them by the New Mexico State Constitution. The Court's ruling declares the regulation unconstitutional and therefore void. Such a ruling has the effect of rendering the regulation ineffeective [sic]. Thus, the Department is permanently enjoined from enforcing or acting pursuant to the regulation.

The application for permanent injunction is **GRANTED.**

EXHIBIT 6

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. SF 95-867(C)

NEW MEXICO RIGHT TO CHOOSE/NARAL, ABORTION AND REPRODUCTIVE HEALTH SERVICES, PLANNED PARENTHOOD OF THE RIO GRANDE; CURTIS BOYD, M.D., LUCIA CIES, M.D., BRUCE FERGUSON, M.D., and LEWIS H. KOPLICK, M.D.,

Plaintiffs,

v.

DOROTHY DANFELSER, Secretary of the New Mexico Human Services Department,

Defendant,

and

EUGENE J. KLECAN and JOHN R., LINTON,

Defendants in Intervention.

ORDER OF JUDGMENT
(Endorsed July 26, 1995)

Based upon the submissions and arguments of the parties, the record before the Court, and my Memorandum Opinion previously filed in this case,

IT IS ORDERED that:

1) Plaintiffs' motion for summary judgment is hereby granted;

2) Under the New Mexico Constitution women otherwise eligible for full coverage of

pregnancy-related services in New Mexico's Medicaid Program are entitled to non-discriminatory funding of abortion services;

3) The Defendant, her agents and her successors in office are hereby permanently enjoined from enforcing the Final Regulation Governing Pregnancy Termination Procedures. N.M. Human Serv. Reg., Apr. 18, 1995, insofar as it denies state Medicaid coverage for medically necessary abortions or otherwise subjects abortion services to discriminatory treatment;

4) Plaintiffs' request for attorneys' fees is denied; and

5) Plaintiffs are entitled to reasonable costs and shall submit a cost bill within 20 days of this Order pursuant to LR1-307 of the First Judicial District.

/s/ STEVE HERRERA
Honorable Steve Herrera
District Court Judge

Submitted By:

/s/ Maureen A. Sanders
Maureen A. Sanders
Attorney for Plaintiffs

Approved Only as to Form:
Telephonically approved 7/24/95

/s/ _____
Don Buckner
Attorney for Defendant

Telephonically approved 7/15/95

/s/ _____
Eugene E. Klecan
Attorney for Intervenors

EXHIBIT 7

State of New Mexico
HUMAN SERVICES DEPARTMENT

(SEAL) (LOGO)

HUMAN SERVICES REGISTER

I. DEPARTMENT

NEW MEXICO HUMAN SERVICES DEPARTMENT

II. SUBJECT

PREGNANCY TERMINATION PROCEDURES

III. PROGRAM AFFECTED

(TITLE XIX) MEDICAID

IV. ACTION

PROPOSED REGULATIONS

V. BACKGROUND SUMMARY

Prevention of unwanted pregnancies is a priority of the New Mexico Human Services Department through its Medicaid Family Planning services as well as educational programs. Family Planning services are being expanded within Medicaid and educational outreach programs developed in conjunction with other state agencies to help insure accurate information is available to all New Mexicans regardless of age, location or financial status.

The Department of Human Services recognizes, however, that despite these efforts, unwanted pregnancies occur and that a woman's right to terminate a pregnancy is

constitutionally protected. During the past year, it was brought to the Department's attention that Medicaid eligible women are being denied coverage for pregnancy termination procedures they are otherwise legally entitled to receive, such denial in derogation of their constitutional rights. After researching the issue thoroughly and to avoid litigation that the Attorney General and the Department determined would be both expensive and unsuccessful, the Department has elected to promulgate regulations establishing the right of female Medicaid recipients to terminate a pregnancy pursuant to rules and regulations.

The proposed regulations provide that the termination procedure be "medically necessary", and that specific informed consent be given by the patient prior to the procedure. The regulations also provide for pre or post decision counseling for the patient, such counseling is paid for by Medicaid when furnished by approved providers.

VI. REGULATIONS

These regulations will supersede regulation in Section 310.0104(K) of existing regulations or Physician Services and be incorporated as § 766 of the Medicaid manual as follows:

The New Mexico Medical Assistance Program (Medicaid) pays for medically necessary health services furnished to eligible recipients, including services to terminate pregnancy.

This section describes eligible providers, covered services, service limitations, and general reimbursement methodology.

766.1 Eligible Providers

Upon approval of New Mexico Medical Assistance Program Provider Participation Applications by the New Mexico Medical Assistance Division (MAD), the following providers are eligible to be reimbursed for furnishing services to terminate pregnancy and/or pre or post decision counseling or psychological services:

1. Individuals licensed as doctors of medicine or osteopathy;
2. Hospitals or clinics; and
3. Individuals licensed to furnish psychological services.

Upon enrollment, providers sign a provider contract and receive a packet of information, including Medicaid program policies, billing instructions, utilization review instructions, and other pertinent material from MAD.

766.2 Provider Responsibilities

Providers who furnish services to Medicaid recipients must comply with all specified Medicaid participation requirements. See. Section 701, General Provider Policies.

Providers must verify that individuals are eligible for Medicaid at the time services are furnished and determine if Medicaid recipients have other health insurance.

Providers must maintain records which are sufficient to fully disclose the extent and nature of the services provided to recipients. See. Section 701, General Provider Policies. The physician certification form and a copy of the signed informed consent must be attached to the Medicaid claim form.

766.3 Covered Services and Service Limitations

766.31 Coverage of Termination Procedures Medicaid covers services to terminate pregnancy under the following conditions:

1. The life of the recipient will be endangered should the pregnancy be allowed to continue, as certified by the treating physician;

2. The procedure is required to terminate a pregnancy resulting from rape or incest, as certified by the treating physician and/or the appropriate reporting agency;

3. The procedure is necessary for termination of an ectopic pregnancy; or

4. The procedure is medically necessary, which means that the treating physician certifies that in his/her best medical judgement the termination is necessary because of physical, emotional, psychological, familial, or age factors (or any combination of these) relevant to the recipient.

766.32 Pre-Decision Counseling Medicaid covers independent pre-decision counseling services furnished by an eligible Medicaid provider. Counseling services must be furnished in a neutral unbiased manner and

include information about procedure alternatives and options for assistance.

766.33 Post-Decision Counseling Medicaid also covers post decision counseling services furnished by an eligible psychological service provider. See. Section 717, Psychiatric and Psychology Services.

766.4 Noncovered Services

Services to terminate pregnancy are subject to the limitations and coverage of services which exist for other Medicaid services. See. Section 602, General Noncovered Services. Medicaid does not cover the performance of elective termination procedures.

766.5 Prior Approval and Utilization Review

All Medicaid services are subject to utilization review for medical necessity and program compliance. Reviews may be performed before services are furnished, after services are furnished and before payment is made, or after payment is made. See. Section 705, Prior Approval and Utilization Review. Upon enrollment, providers receive instructions and documentation forms necessary for prior approval and claims processing.

766.51 Prior Approval Services to terminate pregnancy do not require prior approval from MAD or its designee.

766.52 Eligibility Determination Providers must verify that individuals are eligible for Medicaid at the time services are furnished and determine if Medicaid recipients have other health insurance.

766.53 Reconsideration Providers who disagree with review decisions can request a re-review and a reconsideration. See. Section 953, Reconsideration of Utilization Review Decisions.

766.6 Informed Consent

Voluntary, informed consent by the recipient must be given to the provider prior to the procedure to terminate pregnancy. Such consent is valid for thirty (30) days from the date of signature.

766.61 Required Acknowledgements In signing the consent, the recipient must acknowledge that she has received the following information:

1. Alternatives to pregnancy termination;
2. Medical procedure(s) to be used;
3. Possibility of physical and/or mental side effects from the performance of the procedure; and
4. Right to receive pre or post decision counseling services from an independent Medicaid provider.

766.62 Record Retention A dated and signed copy of the consent, with counseling referral numbers, must be given to the recipient. The provider must keep the original with the recipient's medical records.

766.63 Consent or Notification for Minors Emancipated or legally married minors may give informed consent.

Informed consent for an unemancipated minor or a minor not legally married must be dated and signed by a parent, legal guardian, or other adult acting "in loco parentis" to the minor.

If the minor states that consent from a parent, guardian, or other adult acting in loco parentis is not available for personal reasons, the treating physician shall certify that fact and refer the minor to an independent counselor who shall meet with the minor and confirm in writing to the treating physician that the minor is capable of giving informed consent.

766.7 Reimbursement

Medical providers must submit claims for reimbursement on the HCFA 1500 or UB92 claim forms or their successors, based on provider type. Certification of medical necessity, copy of the informed consent, physician certification, and any other required documentation must be submitted with the claim. See. Section 702, Billing for Medicaid Services. Instructions on documentation, billing, and claims processing are sent to approved Medicaid providers.

Reimbursement for the performance of services to terminate pregnancy is made at the lesser of the following:

1. The provider's billed charge; or
2. The MAD fee schedule for the specific service or procedure. See. Billing information in specific provider sections for the fee schedule.

(A) The provider's billed charge must be their usual and customary charge for services.

(B) "Usual and customary charge" refers to the amount which an individual provider charges the general public in the majority of cases for a specific procedure or service.

VII. EFFECTIVE DATE

The Department proposes to implement these regulations effective October 1, 1994.

VIII. PUBLIC HEARING

A public hearing to receive testimony on these proposed regulations will be held at 9:00 a.m., Thursday, September 1, 1994, at the State Capitol Building, (corner of Paseo de Peralta and Old Santa Fe Trial), Room 307, Santa Fe, New Mexico. Parking accessible to persons with physical impairments will be available.

If this regulation is needed in other than printed form, or if persons interested in attending the hearing require other accommodations, please contact the Medical Assistance Division toll free 1-800-432-6217, in Santa Fe at 827-3100, or through the New Mexico Relay System, toll free 1-800-659-8331 at least ten (10) days before the hearing.

IX. ADDRESS

Interested persons may address written or recorded comments to:

Richard W. Heim, Secretary
Human Services Department
P.O. Box 2348
Santa Fe, New Mexico 87504-2348

These comments must be received no later that 5:00 p.m., Thursday, September 1, 1994. Written and recorded comments will be given the same consideration as oral comments made at the public hearing.

X. PUBLICATIONS

Publication of these regulations approved on July 19, 1994.

/s/ Richard W. Heim
RICHARD W. HEIM, SECRETARY
HUMAN SERVICES DEPARTMENT